Neutral Citation Number: [2019] EWHC 1074 (QB)

Case No: HQ17X04185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2019

Before :

MRS JUSTICE YIP DBE

- -

Between :

(1) MR KRISTIAN LEE HANBURY
(Administrator of the estate of MR DAVID JACK HANBURY, deceased)
(2) MRS HAZEL RAYE HANBURY **Claimants**

- and –

HUGH JAMES SOLICITORS
(a firm) **Defendant**

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- -

Mr Richard Viney (instructed by **Birchall Blackburn Law**) for the **Claimants**
Mr Ivor Collett (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 8, 9, 10, 11 April 2019

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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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MRS JUSTICE YIP DBE

Mrs Justice Yip :

1. This is a claim for professional negligence brought on behalf of the widow and estate of Mr David Jack Hanbury ("the claimants") against solicitors who were instructed to pursue a claim arising out of his death from asbestos related lung cancer. The claim did not proceed after an unfavourable medical report was obtained. It is the claimants' case that Hugh James omitted highly material evidence when instructing the medical expert and then failed to notice that this had not been considered.

Factual background

2. The late Mr Hanbury died in January 2010. For many years, he had worked as an insulation engineer (commonly known as a "lagger"). Given his occupational history, mineral fibre analysis was conducted on lung tissue taken during post-mortem examination. This found very high levels of amosite and crocidolite asbestos. An inquest into Mr Hanbury's death concluded that he had died as a result of industrial disease.

3. Mr Hanbury became unwell in late 2009 but his cancer was not diagnosed until shortly before his death. He deteriorated very rapidly. The primary limitation period for a claim under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 expired in January 2013.

4. Soon after the inquest, in August 2010, the family of Mr Hanbury instructed Hugh James Solicitors in Cardiff to consider whether they could bring a claim. Hugh James had been recommended to them as having particular expertise in relation to asbestos claims. In October 2010, Mrs Hanbury, her son Darren, daughter Sharon Powell and son-in-law Robert Powell attended the Hugh James office and met Cenric Clement-Evans, who was then head of the asbestos claims department. Before the meeting, they had provided Hugh James with copies of the post-mortem report and the mineral fibre analysis. Mr Clement-Evans noted that the post-mortem report was "unusually strong" in confirming the levels of asbestos and advised that there appeared to be reasonable prospects of a successful claim, albeit much further work was needed. It was agreed that an application would be made to the firm's conditional fee panel for authority to enter into a conditional fee agreement.

5. Hugh James was formally retained under the terms of a conditional fee agreement on 4 November 2010. I note that Mr Powell was subsequently appointed as the administrator of the estate and that later Mr Kristian Hanbury took over that role. No issue arises as to the identity of the claimants and it is not disputed that a duty was owed to Mrs Hanbury and the estate to exercise reasonable skill and care in advising and pursuing the claim.

6. The initial information provided to Hugh James by Mrs Hanbury suggested only one potential defendant, Severn Insulation Company Limited. However, when Mr Hanbury's National Insurance records were obtained it became apparent that the position was more complex. Mr Hanbury had worked for many employers during his working life, several of whom were known to have used asbestos. The firm spent a considerable amount of time investigating the employment history and attempting to identify witnesses to the work that Mr Hanbury had done with his various employers.

7. In June 2011, Mr Clement-Evans met the family and explained that where there were multiple employers a claim for lung cancer would generally be apportioned such that each employer would only be liable to the extent that they had exposed the deceased to asbestos. I note that, at this time, there was real uncertainty as to how the courts would deal with this complex legal issue. However, the simplified approach adopted by Mr Clement-Evans was not unreasonable and I believe accorded with a significant body of legal opinion at the time. The family were advised that there was a need to obtain further evidence as to the work Mr Hanbury did with his various employers and that apportionment could cause difficulties. Further work was subsequently done by the firm to identify which companies remained in existence and/or were insured at the relevant time. The family appear to have done what they could to assist.

8. It is clear that the firm had concerns about the strength of the available evidence. In January 2012, a trainee solicitor assisting Mr Clement-Evans advised the family that unless they could obtain better witness evidence, they would not be able to take the case any further. It was agreed that an advertisement calling for witnesses should be placed in the local press. This was described as a "last throw of the dice". That did produce some further evidence, causing the same trainee to advise that they were now "a little more optimistic". The next steps were to obtain medical evidence and then send the papers to a barrister to advise.

9. Mr Clement-Evans left Hugh James in 2012. Mr Simon Ellis took over his position as head of the asbestos team. He had already done some work on the claimants' case and took over conduct on Mr Clement-Jones' departure. He wrote to the family in May 2012 explaining the enquiries that had been made to identify witnesses and indicating that the next step was to instruct a barrister who would be asked whether he was willing to act on a conditional fee basis.

10. Instructions were sent to Counsel, Mr Robert O'Leary. He was an experienced barrister, with particular expertise in asbestos related litigation. He was regularly used by Mr Ellis. He entered into a conditional fee agreement dated 31 May 2012. No advice was sought at that stage. Mr Ellis was simply seeking confirmation that Mr O'Leary was willing to act under a conditional fee agreement.

11. It is apparent that Mr Ellis had some continuing concerns about the claim. He reviewed the file on 13 June 2012 and considered a schedule prepared by a junior colleague which listed the potential defendants and noted where insurance cover was in place and where witness evidence was available. Mr Ellis concluded:

> "On this basis, we should potentially recover in excess of 50% of the full value of the claim. As this is a lung cancer claim, this is probably viable."

He then called Mr O'Leary. The attendance note is as follows:

> "SE Telephoning Rob O'Leary.
>
> I said that I had received his CFA. I said I was happy to deal with the claim on that basis but I just wanted to ensure that he was fully aware that the witness evidence we had was unlikely to be improved on. We would not be able to locate additional

> witnesses nor were the witness *[sic]* we did have likely to be in a position to improve upon their statements. Rob said that he fully appreciated this.
>
> I said that on this basis, I would get Letters of Claim sent off and I would arrange for a medical report to be obtained."

Letters of claim were sent that day. Eight potential defendants had been identified.

12. The following day, 14 June 2012, Dr Ian Williamson, a consultant chest physician, was instructed to prepare an expert report. The letter of instruction referred to six witness statements and the Inland Revenue schedule of employment as being enclosed but makes no mention of the post-mortem report or mineral fibre analysis.

13. Dr Williamson's report is dated 26 September 2012. He had apparently seen the deceased's GP and hospital records but not the post-mortem report or mineral fibre analysis. He concluded:

> "There is insufficient evidence within the evidence provided to attribute an increased risk of lung cancer to previous asbestos exposure and on balance of probability his lung cancer was due to cigarette smoking."

14. Having reviewed this report, Mr Ellis wrote to the family on 4 October 2012 explaining that the medical report was not supportive of the claim. He indicated that, as the evidence stood, it would not be possible to proceed with the claim. He advised that it might be possible to obtain evidence from a forensic engineer but advised that the family would have to fund the cost of such evidence. Mr Ellis said that he would need to discuss the position as a matter of urgency. By then, there were only three months left of the limitation period.

15. Mrs Powell telephoned Mr Ellis the next day. He repeated the advice he had given in the letter and reiterated that the cost of obtaining an engineer's report would not be met under the "no win no fee" agreement. He also explained that even if a supportive engineer's report was obtained, the defendants would undoubtedly challenge it and that he could give no assurances. If the claim failed, they would not recover the costs of the report. Unsurprisingly given that advice, the family decided that they could not risk incurring the cost of an engineer's report. By letter dated 8 November 2012, they confirmed that they would not be pursuing the claim. Mr Ellis therefore closed his file and wrote to the proposed defendants' representatives to indicate that Hugh James was no longer instructed. The claim was pursued no further.

16. It is the claimants' case that Mr Ellis was negligent in failing to send the post-mortem and mineral fibre analysis reports to Dr Williamson and in failing when reviewing the report to recognise that he had not seen that material. It is accepted that had Dr Williamson had that evidence his report would have been materially different. The claimants' case is that the claim would then have proceeded, and they would have recovered damages either at trial or through settlement.

17. By their defence, Hugh James, denied breach of duty and contended that, even if a breach was made out, causation was not established, since the claim was not viable for reasons unrelated to the medical evidence.

18. By the conclusion of the trial, breach of duty was conceded. Further, it was accepted that, but for that breach, Dr Williamson would have produced a favourable medical report and further steps would have been taken. However, the defendant continues to deny that the claimants lost anything of real value having regard to the merits of the underlying claim.

Legal principles

19. Breach of duty no longer being in issue, the claimants must prove that the breach caused them to lose the opportunity to pursue their claim and that this represented a loss of something of value. If the court decides that the claimants' chances of success in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of the claimants' prospects of success had the original litigation continued. Generally, the court will be expected to tend towards a generous assessment where the defendant's negligence has lost the claimant the opportunity to pursue the original claim. (See the principles set out by Simon Brown LJ in *Mount v Barker Austin (A Firm)* [1998] P.N.L.R. 493, at pp. 510D to 511C.)

20. The authorities were helpfully summarised by Irwin LJ in *Edwards v Hugh James Ford Simey (A Firm)* [2018] EWCA Civ 1299; [2018] P.N.L.R. 30 in the context of the under-settlement of a claim under a government compensation scheme for ex-miners suffering from vibration white finger. Irwin LJ made it clear (at para. 61) that in professional negligence cases, as in other cases, the court's function is to establish what losses resulted from the negligence. Then (at para. 63) he said this:

> "Setting aside any question of after-coming evidence, sometimes examination of the original claim will demonstrate that the lost claim, or part claim, was completely hopeless, in which case the professional negligence claim is worthless. Sometimes the lost claim would have been unanswerable, in which case the full value of the original claim should be recovered. In many cases, the value of the original lost claim cannot be assessed as hopeless or cast-iron, and the court must assess a percentage prospect of success as applied to what would have been recovered if the original claim had been recovered in full. It is important to stress that in all three cases the assessment is of the value of the lost claim, not a trial of the original cause at the time of the negligence claim. That is true of the worthless case and the cast-iron case as much as it is true of cases with less certain outcomes."

21. Having stressed that the court trying the professional negligence action is seeking to establish what was lost by the claimant, as at the date or notional date of trial or settlement, Irwin LJ said at para. 68:

> "It is a perfectly permissible approach to an assessment of the value of a claim to consider the prospects and amount of settlement …"

22. I note that the Court of Appeal heard *Edwards* prior to the Supreme Court's decision in *Perry v Raleys Solicitors* [2019] UKSC 5; [2019] 2 WLR 636 and I believe that an appeal to the Supreme Court is outstanding. However, that appeal relates to the treatment of evidence which would not have been available at the notional date of trial or settlement. I do not believe that Irwin LJ's concise summary of the authorities as set out above is contentious and I therefore adopt it as a convenient starting point.

23. In *Perry*, Lord Briggs JSC explained at para. 17 that the concept of loss of opportunity or loss of chance applied where:

> "… what has been lost through negligence is a claim with substantial but uncertain prospects of success, where it would be absurd to decide the negligence claim on an all or nothing basis, giving nothing if the prospects of success were 49%, but full damages if they were 51% …"

He continued:

> "A further reason why this is a generally unrealistic approach is that most claims with evenly balanced prospects of success or failure are turned into money by being settled, rather than pursued to an all or nothing trial."

24. Lord Briggs then summarised the principles set out in *Mount v Barker Austin* at para. 34:

> "In summary, they require the claimant only to prove that the lost claim had a real and substantial, rather than merely negligible, prospect of success, following which the court was obliged to conduct an evaluation of the prospect of success, rather than a trial within a trial of the underlying claim."

25. It is therefore clear that the claimants must prove that, but for Mr Ellis's negligent handling of the medical evidence, the underlying claim would have had a real and substantial prospect of success. If they overcome that hurdle, the court must assess the lost chance rather than determining the hypothetical outcome at trial of the underlying claim.

The evidence

26. I heard from Dr Williamson, who confirmed that he had not received the post-mortem report or mineral fibre analysis. Had he seen this material, he would not have reached the conclusion he did, as set out above. Rather, he would have recorded that the results clearly supported the attribution of lung cancer to asbestos such that medical causation was established.

27. I heard evidence from Mr and Mrs Powell. Mrs Hanbury was not well enough to attend court, but her written evidence was admitted. The statement of Kristian Hanbury was also admitted by agreement. He attended court but it was unnecessary for him to be cross-examined. The reality was that the family added little of significance to the key issues beyond what was contained in the contemporaneous file notes and correspondence. That implies no criticism of them. They were entirely straightforward people and it appeared to me that they had acted reasonably throughout.

28. The evidence of Mr Ellis was important. He was cross-examined at some length. His position changed during the course of that cross-examination and, regrettably, I had some reservations about his reliability as a witness. I do not say that he set out to mislead the court. Mr Viney submitted that he "had clearly put a slant on events with hindsight in an attempt to deflect criticism", whether consciously or sub-consciously. I consider that is a fair description.

29. Mr Ellis departed quite significantly from his written evidence and his final position was not consistent with the defendant's pleaded case. This was surprising. As a solicitor, he can hardly claim not to have understood the importance of attesting to the accuracy of the defence, which he signed, and his witness statement. A particularly troubling aspect of his evidence was the way in which he dealt with a letter he had sent to the litigation insurers on 23 January 2013. That letter contained a claim for £2,490 under the terms of the policy to cover disbursements incurred in relation to the claim, including Dr Williamson's fee for his report. Mr Ellis wrote:

> "We refer to the above matter and regret to inform you that this claim has now abandoned.
>
> This is a matter concerning an asbestos related claim against Severn Insulation Company Limited. Initial instructions were taken and potential defendants identified. A letter of claim was submitted to the various defendants. The defendants indicated that they were not in a position to confirm or deny liability and put the claimant to strict proof of the same.
>
> Witnesses were located with the assistance of an advert placed in local papers on two occasions. The witness evidence obtained was favourable to the claim and the prospects of establishing liability were judged as favourable.
>
> A medical report was then obtained on behalf of Mr Powell Regrettably, the report was not supportive of the claim. The medical evidence of Dr Ian Williamson confirmed that Mr Hanbury suffered with lung cancer. However, Dr Williamson took the view that there was not sufficient evidence of asbestos exposure from the medical records to enable him to conclude that the lung cancer was attributable to asbestos, on the balance of probabilities. In light of this report, it is not possible to proceed further with this claim."

30. The account to the insurers was consistent with the claimants' case that the reason for not proceeding with the claim was the unfavourable medical evidence. However, Mr Ellis said in evidence that he did not accept that this was an accurate representation of the position. When cross-examined about this, I was concerned that he may not have recognised the potential for self-incrimination. I therefore intervened to point out that if I were to make a finding that he had materially misrepresented the position when making an insurance claim, that might have serious implications. I sought to give him time to pause and reflect before continuing but Mr Ellis's response was to immediately withdraw the suggestion that the letter was inaccurate and to stand by its contents.

31. By the conclusion of his evidence, Mr Ellis had admitted that he probably did not send the relevant evidence to Dr Williamson and that it was an error on his part not to identify when reviewing the report that Dr Williamson had not mentioned the post-mortem findings. He accepted that it was his decision that the claim could not proceed any further unless the family were willing to pay for an engineer's report. Further, he conceded that had a positive medical report been obtained, the claim would not have ended at that stage. Instead, he would have sent the report to the potential defendants' representatives, pointing out that it confirmed that the deceased had died of asbestos related cancer. He would not have served the witness evidence at the same time. If liability was not accepted and if the potential defendants maintained that they wished to see the witness evidence, he would then have instructed Mr O'Leary to advise on the merits and on evidence. Given the impending expiry of limitation, he accepted that he would have issued protective proceedings if necessary, while awaiting responses from the potential defendants and/or counsel's advice. Had counsel provided supportive advice, he would have been duty bound to serve the proceedings. If counsel had advised obtaining an engineering report, that would have been done and, in those circumstances, would have been covered by the litigation insurance so that there would have been no requirement for the family to fund it.

32. What would have happened after the service of a favourable medical report and the instruction of counsel depends upon the actions of third parties (the proposed defendants' representatives and Mr O'Leary). This therefore requires an evaluation of the chance of the defendants accepting liability and/or counsel supporting proceeding with the claim. Mr Ellis's evidence was to the effect that he would have remained pessimistic about the prospects of success.

33. Where Mr Ellis's evidence was self-serving, I approach it with caution because of my reservations about his reliability generally. I consider that the contemporaneous attendance notes and correspondence provide a better source of evidence. The file does demonstrate that Hugh James had concerns about the strength of the witness evidence throughout and that Mr Ellis maintained such concerns at the time that the medical evidence was obtained. However, he had discussed his concerns with Mr O'Leary and had been persuaded that there was sufficient merit for the cost of obtaining medical evidence to be incurred and for the firm to continue to act under the conditional fee agreement. No further review of the witness evidence took place thereafter and it is clear that it was the receipt of the unfavourable medical evidence that caused him to advise the claimants as he did and to decide that Hugh James would not continue to act under the conditional fee agreement unless the family were prepared to pay for an engineer's report.

Expert evidence

34. The parties each relied upon expert evidence in the fields of litigation funding and engineering. The evidence of the litigation funding experts was introduced to deal with the defendant's pleaded case that Hugh James would not have been willing to continue to act under the terms of the conditional fee agreement even with supportive medical evidence. The issues between the funding experts were narrowed considerably in their joint statement. Essentially, they agreed that other forms of litigation funding would not have been available at the time but that there were a good number of ATE insurers operating in this field and that the claimants were likely to have had the benefit of such insurance if another firm of solicitors advised that the prospects of success were greater than 50%.

35. In so far as the funding experts went further and expressed opinions on the risk assessments carried out by Mr Ellis, it seemed to me that this went beyond what was permissible. The parties accepted that I was able to draw on my own substantial experience of risk assessment in personal injury litigation. In the circumstances, the parties decided that it was unnecessary for the experts to give oral evidence. In the event, the significance of this evidence largely fell away given Mr Ellis's evidence and his concession that further steps would have been taken by Hugh James with the benefit of supportive medical evidence.

36. In his report, the claimants' expert, Mr Pipkin, expressed the view that asbestos cases involving laggers were generally considered good cases to insure within the ATE market in 2012. I note that Mr Blackburn, the defendant's expert did not contradict this. It seems to me that this forms a part of the evidential picture when I come to look at the prospects of the claim being settled. I believe it accords with the evidence I heard from the engineers and it also fits with my experience of asbestos related litigation at the Bar.

37. The admission of expert engineering evidence was contentious. Master Cook had refused the claimants' application for permission to rely on such evidence, but that decision was overturned by Jacobs J on appeal. Having seen a note of the judgment, it appears that engineering evidence was admitted on the basis that such evidence would have been obtained in the underlying claim if the defendants in that action had raised the issues about causation and exposure which Hugh James contended in their defence would have come into play.

38. I entirely accept that had the asbestos claim proceeded to trial, it is likely that there would have been engineering evidence. However, for reasons which I will set out below, I think it very unlikely that this matter would have gone to trial. In those circumstances, I consider it far from certain that expert engineering evidence would have been obtained. However, the evidence is relevant in considering the potential strength of any defence in the underlying claim.

39. The engineering evidence was not agreed and both experts were called to give oral evidence. I was concerned when hearing this evidence not to conduct a "trial within a trial" of the underlying claim. Had I been faced with two experts of broadly similar quality who reached different views, I would have regarded their evidence as representing the range of reasonable opinion that might have become available in the underlying claim. However, that was not the case. On his own admission, the

evidence of Mr Powell, who was called by the defendants, did not represent the evidence that he would have provided had he been instructed in the underlying claim.

40. Mr Chambers, who was instructed on behalf of the claimants, provided a short form report in which he indicated that it was likely that Mr Hanbury had been heavily exposed to asbestos dust during his employment with thermal insulation contractors before 1977/78 and to have been exposed at a lower level thereafter. He considered that evidence from Mr Hanbury's brother supported the use of asbestos during his work with Versil Limited. He then set out a table, weighting exposure before 1977/78 100 times higher than that in employment after that date, leading to a suggested apportionment between employers. He stressed that this could be no more than an estimate. He suggested his broad assessment of lifetime dose was consistent with the post-mortem mineral fibre analysis.

41. Mr Chambers gave his evidence in an entirely straightforward way. I was satisfied that he had substantial experience of reporting in asbestos cases and that he approached reporting in this case as he would have done had he been instructed in the underlying litigation. I considered his evidence to be reliable. He dealt with questions put to him in an appropriately considered way. He acknowledged that his opinion was based upon assumptions and inferences, but he fully explained the assumptions he had made and I found nothing inappropriate in his approach.

42. It was suggested to Mr Chambers that he had sought to make the evidence fit his theory of the case. To back this up, Mr Collett referred to a decision of Peter Marquand, sitting as a Deputy High Court Judge, in *Hawkes v Warmex Limited* [2018] EWHC 205 (QB), in which it was said that the judge had made the same criticism. Leaving aside my concerns about the way in which this was introduced, without first providing the court or the claimants' representatives with a copy of the judgment, I thought that Mr Chambers responded very well to the criticism. In *Hawkes*, the judge had made it clear that he did not question Mr Chambers' credibility but was concerned about the possibility of confirmation bias. The judge had also been critical of the opposing expert in that case. Mr Chambers indicated that he took the criticism on board, discussing the judge's conclusions with leading counsel and seeking to ensure that he did not fall into a similar trap again. The impression I had of him as a careful and reflective expert suggests that he has indeed learnt from the experience.

43. Mr Chambers' evidence was not undermined by cross-examination and I accept that it is likely that he, or a similarly experienced and reliable expert, would have provided an opinion supporting the claim had expert evidence been obtained in the underlying litigation.

44. Unfortunately, I cannot say the same about the reliability of Mr Powell. He was a poor witness, who was visibly uncomfortable in the witness box. In his report, he appeared to have entered into the arena and to have strayed into issues that were matters for the court to decide on rather than for expert opinion. He did acknowledge that it is generally not the role of the engineering expert to comment on the evidence but had then said that he felt he had to in the context of this particular case. He concluded that there was insufficient evidence to comment on Mr Hanbury's work with insulation materials other than during his employment with Versil Limited. In relation to Versil, he suggested it was unlikely that they would have used asbestos

products as they were a major manufacturer of fibreglass insulation. In doing so he rejected the witness evidence which suggested otherwise. In that regard I consider that he overstepped his role as an expert witness quite significantly.

45. When asked about this, Mr Powell acknowledged that his was an unusual report. He confirmed that he had not approached it in the same way as he would if he had been reporting in the original claim. Remarkably, he then volunteered the explanation that he had been "biased". That was not an accidental slip. He accepted on multiple times during questioning by Mr Viney that his evidence may show evidence of sub-conscious bias. He accepted he should have left the factual issues to the court and confirmed that he would not have produced a report that looked like the one in this claim had he been instructed by one side or the other in the original litigation.

46. I wonder whether Mr Powell's acceptance of bias on his part came about because of the questioning of Mr Chambers about the *Hawkes* case. Whatever the reason, it was an extraordinary confession. His evidence from the witness box led me to the view that I could place no reliance on his report. It did not represent something that fell within the range of reasonable opinion that might have been obtained in the original claim. I conclude that any engineering evidence obtained in the claim is likely to have been much closer to that of Mr Chambers.

47. What was clear was that both engineering experts accept that laggers were commonly exposed to high doses of asbestos fibres during the 1960s and early 1970s. In the later 1970s and into the 1980s awareness grew of the need for precautions, significantly reducing exposure levels. Both experts also confirmed that cases involving laggers made up a relatively small proportion of their caseload, although statistically such workers are those who were most exposed to asbestos. Mr Powell has never previously given evidence in a civil claim. Mr Chambers has given evidence in six cases involving asbestos claims but none involving laggers. He has been warned for trial in some cases involving laggers, but they have settled.

Analysis and conclusions

48. The defendant's admitted breach of duty led to this claim being discontinued. But for that breach, a favourable medical opinion would have been obtained from Dr Williamson and would have been served on the proposed defendants to the claim. Mr Ellis would undoubtedly have pointed out the strength of the case in that medical causation was clearly made out, as would any competent solicitor. Offers of settlement would have been invited.

49. It is likely that the insurers for the various employers would have coordinated a response to the claim. That process had already begun. I note that not only were there eight potential defendants but also many of the employers had more than one insurer. Therefore, the process of attributing liability between the various "paymasters" was not straightforward. Michael Mackenzie was acting on behalf of BAI, who insured Severn Insulation Company Limited for a period covering 846 days of Mr Hanbury's employment. He had responded to the letter of claim on 14 August 2012 requesting that all relevant employers were joined into the action. He raised the issue of apportionment at that stage. (I note that he described lung cancer as a divisible injury and that Mr Ellis accepted this in his reply. That is not in fact correct. However, it was not unreasonable for Mr Ellis to accept in 2012 that liability was

likely to be apportioned and so I need say no more about this.) In a further email dated 23 August 2012, Mr Mackenzie said:

> "Clearly, in view of the number of potential defendants, apportionment of liability will be a difficult issue and it is for this reason that I have requested earlier voluntary disclosure of your Client's detailed statement and any other lay witness evidence you may hold at this stage. I honestly think that this will be in your Client's best interests as this will give us the best prospects of being able to reach an agreement with the other interested parties with a view to agreeing any settlement proposals pre-litigation. On that basis, I would be happy to accept any such signed lay witness evidence on a without prejudice basis."

50. It is clear that other insurers responding to the letters of claim were also keen to have details of and references for any other insurers who had advised of their interests in the claim. Rob Hull, instructed by insurers for Versil Limited, was also seeking information about other insurers. In a letter dated 14 September 2012 addressed to BAI he wrote:

> "Subject to our consideration of liability and quantum we will contribute on the usual time exposed basis."

51. Having received that letter, Mr Mackenzie produced a "draft apportionment table" on a time served basis and invited the insurer on risk for the greatest number of days to take over the role of "overall coordinator".

52. I fully accept that there had been no clear acceptance by any insurer that the claim should be dealt with by way of apportionment between them on a time exposed basis. However, I am satisfied, having reviewed the correspondence, that matters appeared to be moving in that direction. That fits with the reality of the situation. The only real issue likely to be live in this claim was apportionment. In the case of a lagger with a confirmed post-mortem diagnosis of significant levels of asbestos fibres in the lungs, it seems unlikely that the insurers would want to engage in a costly trial of liability but they would undoubtedly wish to ensure that liability was apportioned between those who had been responsible for the exposure (including those against whom recovery was no longer possible).

53. Mr Collett submitted that there were a number of hurdles for the claimants to overcome, such that the loss of chance had to be assessed as Simler J did in *Chweidan v Mishcon de Reya* [2014] EWHC 2685 (QB) by considering the risks at each stage and discounting accordingly.

54. I do not accept that this case did involve multiple hurdles. The first hurdle Mr Collett contended for was the need for favourable advice to be given by counsel. Mr Ellis confirmed in evidence that he would not have sought counsel's advice before sending the medical evidence to the defendants. It is possible that this would have produced an offer of settlement. However, given the impending expiry of limitation and the need for coordination between the various insurers, I consider it more likely that there would have been a need to issue and probably serve proceedings. That would have

involved the instruction of counsel. However, I do not accept that there was any prospect that counsel would have advised at that stage that the claim had insufficient prospects of success to run further.

55. Although Mr Ellis said that it was not uncommon for counsel to enter into a conditional fee agreement but later not to support the issue of proceedings, to suggest that Mr O'Leary would have withdrawn his support for the claim at this stage would in effect amount to an allegation of unprofessional conduct on his part. Sensibly, Mr Collett did not make that suggestion. There would not have been a shred of evidence to support it. Although the documentation is limited, it is clear that Mr Ellis had raised his concerns about the witness evidence with Mr O'Leary. Mr Ellis trusted Mr O'Leary. He described him as his "go to" barrister. There is not the slightest reason to think he would have encouraged Hugh James to incur the cost of obtaining medical evidence despite their concerns, only to then decline to continue with the conditional fee agreement he had entered into in full knowledge of the evidential picture and when the only change had been the obtaining of favourable medical evidence.

56. It is by no means certain that engineering evidence would have been obtained. The defendants may have taken the view that, given there could be no dispute about medical causation and having regard to Mr Hanbury's occupation as a lagger, there was no real need for engineering evidence. If such evidence was obtained, it can reasonably be assumed that it would have been in similar terms to that of Mr Chambers.

57. I consider that it is highly unlikely that this claim would have gone to trial. The vast majority of industrial disease claims are resolved without trial. The evidence of the engineering experts further demonstrates the unlikelihood of an asbestos related claim involving a lagger fighting to trial. I consider that the responses from the insurers provides some support for the notion that at least some of them were beginning to think about the possibility of settlement, apportioning liability on a time served basis. The standard terms of the conditional fee agreement for industrial disease litigation, with staged uplifts, provided a strong incentive for insurers not to contest a trial they were unlikely to win.

58. On the other side, it is apparent that Mr Ellis did retain concerns about the claim. He is unlikely to have relished a trial. On the evidence I heard, I do not consider it at all likely that alternative solicitors would have been instructed at any stage. The family had put their trust in Hugh James, as demonstrated by their acceptance of the advice they received when the unfavourable medical evidence was obtained. They are likely to have followed any advice provided by Mr Ellis and/or Mr O'Leary about settlement.

59. Therefore, the real issue I am concerned with in assessing what was lost by the defendant's negligence is the prospect of the original action being settled.

60. The approach which Mr Collett urged upon me was to look at the potential value of a settlement but to apply various discounts for the hurdles that had to be overcome to arrive at a settlement. By way of 'worked example', he took a settlement value for the claim in the region of £60,000 and applied a 50% discount for the chance of counsel advising the issue of proceedings and/or obtaining engineering evidence and

then allowed for only a 30% chance of settlement. In that way, he arrived at a loss of chance valuation of just £9,000.

61. I am unable to accept that this is the correct approach to assessing the loss of chance in this case. It involves building in multiple discounts effectively for the same risks. The settlement value of a claim will take into account the risks of litigation and the parties' views of the prospects of success at trial. To take the notional settlement value as the starting point and then to discount that in the way Mr Collett suggests would not fairly compensate the claimants for what they have lost.

62. Further, this approach is not consistent with the authorities. As the judgments of Irwin LJ in *Edwards* and Lord Briggs in *Perry* illustrate, the reason it is permissible to consider the prospects and likely amount of a settlement is that this is the reality of how claims with uncertain prospects of success are converted into money's worth. That does not mean that the starting point for the value of the claim is its settlement value. The starting point remains the value if it had been recovered in full, which must be discounted having regard to the prospects.

63. In my judgment, there were good prospects of the claimants succeeding in recovering damages if the case went to trial. The only real issues, in my view, were how much would be recovered and from which defendants. Mr Hanbury was a lagger and the available witness evidence confirmed that he had worked with asbestos, at least at times. The post-mortem lung samples showed very high levels of asbestos fibres, far in excess of the levels required to satisfy the Helsinki Criteria for attribution of lung cancer to asbestos. There could be no sensible doubt therefore that a court would find that Mr Hanbury's lung cancer was caused by occupational exposure to asbestos. Mr Chambers' evidence was that the very high levels of exposure needed to produce the findings at post-mortem would not have occurred over a short period.

64. A court would have been likely to approach the claimants' position with some sympathy. There had been no knowing delay on the claimants' side in bringing the claim. The diagnosis was not made until after Mr Hanbury's death such that there had not been the opportunity to take a witness statement from him. As Mr Chambers said in evidence, the evidence in this case was not atypical for a case of this nature.

65. This retrospective view of the prospects of success is supported by the approach of Mr Ellis and Mr O'Leary, as recorded in the contemporaneous records, including the attendance note of 13 June 2012 and the letter to the ATE insurer on 23 January 2013.

66. The Particulars of Claim put the claim on the basis that the claimants would have recovered damages by way of settlement and/or judgment and/or under the trust scheme set up to meet claims against Turner and Newall, upon that company going into administration. Following a request for further information under CPR Part 18, it was suggested on behalf of the claimants that liability against Versil was clearcut and that it would have been unnecessary to join other defendants unless Versil raised apportionment issues.

67. It seems to me that although it may have been argued at that time that Versil should have met the entire claim, given at least one insurer for Versil had already raised the possibility of apportionment on a time served basis, it is very likely that apportionment would have become a live issue. It is also apparent that Mr Ellis had

apportionment in mind. Although, the Part 18 reply criticises his "scattergun approach" in sending letters of claim to all potential defendants, I think that criticism is unwarranted. The limitation position meant that it would have been tactically unwise to leave out potential defendants, risking difficulties in pursuing them later if Versil did not accept the full claim. It is therefore more likely that the claim would have proceeded against all potential defendants where there was a prospect of enforcing a judgement because they were insured and/or remained solvent.

68. Although proceeding against multiple defendants would have added complexity to the litigation, the apportionment issue would have presented greater difficulties for the defendants than for the claimants. If an individual defendant were able to avoid liability, that did not mean that the claimants overall damages would be reduced. Rather, the total liability would be apportioned between fewer defendants so that the shares of the remaining defendants would increase. This reality no doubt influenced the desire of some of the claims handlers involved to begin coordinating a response.

69. The only real difficulty apportionment presented for the claimant was the position in relation to those companies who were not insured and were no longer live. Insurers had not been identified for Newport Co-op and Croft Insulation. The remaining defendants are likely to have contended that Mr Hanbury was likely to have been exposed to asbestos in the course of his employment with them and to have required a notional apportionment which the claimants could not recover. It is difficult to say how that issue would have been resolved at trial. It plainly presented a litigation risk, which I consider would not have been run by the claimants. I do not believe though that there was any real risk that the court would find that all exposure occurred during these periods of employment such that the claim would have been defeated altogether.

70. As far as Mr Hanbury's employment with Newall Insulation is concerned, this would have been covered by the Turner and Newall Trust Scheme. This would be dealt with outside the litigation process. Mr Ellis had sought an application form for the scheme. Mr Hanbury's period of employment with Newall was only four months. Making a claim is more straightforward for those who were employed for at least six months, for whom there is an expedited review process. Lesser periods of employment call for individual review. Mr Ellis told me that he could not recall a case in which he had secured recovery under an individual review. While I do treat his evidence with caution, it seems to me that had the claimants recovered the bulk of their claim against the live defendants, they may not have pressed particularly hard for a payment under the scheme. I see no reason why the application would not have been made, seeking a proportion of the unrecovered damages from the trust, but I accept there is some real uncertainty as to whether the trust would have made a payment in this case.

71. Having concluded that, overall, the claimants had good prospects of succeeding at trial against some or all of the live defendants, I consider that it is highly likely that the claim would have been settled. The insurers are likely to have taken a commercial view and will have been reluctant to incur the costs of trial at which the claimants were likely to succeed. The trial costs of multiple defendants and of the claimants' legal team with 100% uplifts are likely to have exceeded the value of the claim, adding to the commercial pressure to settle.

72. I am therefore entirely satisfied that the claimants have lost something of real and substantial value through the defendant's negligence. I must therefore assess that loss in accordance with the legal principles set out above.

73. I consider that this case calls for a relatively broad assessment, looking first at the likely value after trial and then applying appropriate discounts so as to fairly reflect my assessment that this was a claim that was highly likely to be settled before trial.

74. Both counsel helpfully provided me with their valuations, breaking them down under each head of loss. Mr Viney arrived at a total valuation of £225,996 compared to Mr Collett's total of £163,256. It should be noted that these figures are not directly comparable since Mr Viney attempted to provide a realistic valuation of the likely full award at trial whereas Mr Collett based his figures on likely settlement figures, albeit assuming a full liability valuation.

75. A good illustration of how this distinction operates is the approach to the financial dependency. This represented a dependency on Mr Hanbury's pension. Unlike a claim based upon earnings, where contingencies other than mortality may have to be factored in, the only contingency in a claim based on pension payments is mortality, which is already accounted for by the multiplier. Mr Viney put forward a sum of £102,000. This used a multiplier from the date of death in accordance with the then binding authority of *Cookson v Knowles* [1979] AC 556, which has since been overruled by *Knauer v Ministry of Justice* [2016] UKSC 9. Had this matter in fact proceeded to trial, it is likely that the claimants would have contended for a modified approach as suggested in the introductory notes to the Ogden Tables current in 2012. The conservative approach adopted by Mr Viney could not realistically have been challenged at trial. However, Mr Collett's valuation includes a discount of approximately 20% to £80,000. He explained this on the basis that the defendants in the claim are likely to have sought that sort of discount for settlement purposes. If that 'settlement discount' is introduced at the first stage, it seems to me that there is a real risk of applying what is effectively the same discount more than once so producing an unfair result.

76. As a starting point, I therefore prefer Mr Viney's approach of attempting a full valuation of the claim and then discounting from that. However, since I am not trying the original action, I will make a fairly broad assessment of what might reasonably have been recovered rather than attempting to decide issues as to quantum that may have arisen in the notional trial.

77. Taking that approach, I consider that the figures put forward by Mr Viney were not unreasonable. I accept that he attempted to give a realistic valuation of what may have been awarded at a trial of the claim. However, I consider some of his figures to be at the high end of any range and will adjust them accordingly.

78. In relation to pain, suffering and loss of amenity, the claimants' figure was £60,000 and the defendant's £51,500. That probably represents the range of likely awards. The relevant bracket in the Judicial College Guidelines at the time gave a range of £50,000 to £69,500. Without in any way wishing to downplay Mr Hanbury's suffering, he did not experience symptoms for as long as some others and I think a court would have placed him into the lower part of the bracket. I will use a figure of £55,000.

79. I consider Mr Viney's discounted figure for care and assistance of £6,500 to be reasonable and also accept that it is not unrealistic to think the claimants would have recovered £3,000 in respect of past services. The miscellaneous expenses, statutory bereavement award and funeral expenses are not challenged.

80. The so-called *Regan v Williamson* claim for loss of intangible benefits is more controversial. Such an award was made to a spouse in *Mehmet -v- Perry* [1977] 2 All E.R. 529 and claims under this head are generally included in fatal accident actions. Any award under this head is likely to be modest, meaning that it would be extremely unlikely that the parties would litigate over this issue alone. Generally, the chance of recovering something under this head might be factored into a settlement in a more general way. Recently, there have been some conflicting decisions at High Court level as to whether such a claim is properly recoverable, particularly if coupled with a quantified claim for future services dependency. I do not consider it necessary, or appropriate, to enter into the general debate about *Regan v Williamson* awards for the purpose of assessing the loss of chance in this claim.

81. I believe it is more sensible to look at the *Regan v Williamson* claim and the future services dependency together. There are 'swings and roundabouts'. A judge might have accepted the services claim with limited deduction but not allowed a *Regan v Williamson* award; another judge might have made a more broadbrush and lower assessment of services but included the *Regan v Williamson* award. Mr Viney proposed a sum of £36,240 for future services. In doing so, he reduced the pleaded claim to reflect a reduction in the services Mr Hanbury would have provided after age 80. Arguably, a court would have made a greater reduction, perhaps assuming the cessation of all services during old age. Adopting a more 'rough and ready' approach, Mr Collett suggested a 20% reduction from the pleaded figure to £29,000. Looked at in the round, I would allow a sum of £35,000 to cover both future services and any *Regan v Williamson* award without seeking to break that down further.

82. I have already indicated why I consider Mr Viney's figure for loss of financial dependency to be a conservative estimate which was unlikely to be reduced at trial.

83. Drawing these sums together, I arrive at a full liability valuation of the claim as follows:

PSLA	£55,000
Care and assistance	£6,500
Services	£3,000
Miscellaneous expenses	£1,500
Bereavement award	£11,800
Funeral expenses	£2,456
Financial dependency	£102,000
Services dependency	£35,000 (to include *Regan v Williamson*)

Total **£217,256**

84. In accordance with the approach adopted by Mr Viney, I have not included any interest in this calculation.

85. Contributory negligence has not been explored to the same extent as it might have been in a trial of the underlying action. Mr Hanbury was a smoker and smoked for most of his adult life. However, his cigarette consumption was relatively modest. Based upon the evidence before me, I think it likely that there would have been a discount of 20% for contributory negligence as in *Badger v Ministry of Defence* [2005] EWHC 2941. A lower reduction (15%) was allowed in *Shortell v BICAL Construction Limited* (2008), a decision of Mackay J in the Liverpool District Registry. However, in that case the deceased had given up smoking 20 years before his death. In adopting a deduction of 20%, I recognise that there was some prospect that the claimants might have done better than that had there been a detailed exploration of the risks posed by what appears to have been heavy asbestos exposure and more modest consumption of cigarettes than in *Badger*.

86. Applying a 20% deduction for contributory negligence gives a valuation of £173,805. The question then is the extent to which that should be discounted in valuing the chance that has been lost through the defendant's professional negligence.

87. The claimants' case as set out in the Particulars of Claim was that an appropriate discount to reflect the litigation risks other than contributory negligence would be just 10%. This was put on the basis that the primary litigation risk was that the live defendants would argue that the damages should be reduced to reflect asbestos exposure during employment where there was no insurer and the employer was insolvent. It was suggested that such risk was limited.

88. Mr Viney took a more conservative approach in his closing submissions, suggesting that a discount of 25% might be appropriate for the apportionment risk. He backed this up by producing a total of eight different tables showing different ways of apportioning liability between the insured and uninsured defendants. I have looked at those tables carefully. They reflect a considered and realistic approach by Mr Viney on the claimants' behalf. They take account of various arguments that might have been advanced in the underlying action. Mr Viney relied upon these tables as demonstrating a best case of 92% recovery and a worst case of 62%. He adopted 75% as conveniently representing the middle ground.

89. In fact, I consider a 25% discount for the apportionment risk to be quite generous to the defendant. In looking at the likely range of recovery, the claimants' best case that they might recover in full is not included. Mr Viney's Table A represents assessment on a time-exposed basis and fits with the table that Mr Mackenzie had begun, notwithstanding that this was an unfavourable approach for his client. It could be argued that the available evidence suggests this was likely to represent the defendants' approach. Table A produces the 92% figure, leaving Newalls and Kitsons out of account, although recovery may have been possible through the trust scheme for Newalls and against Kitsons, who are believed to be ongoing although not insured. If they were included, this method of apportionment would suggest recovery in excess of 97%. I highlight this to show the reasonableness of the claimants' final position. It is unnecessary to analyse the potential arguments and to conduct a more detailed

assessment of the apportionment issue. It seems to me that in fact the claimants would have had a good chance of recovering more than 75%. However, that represents a realistic and sensible settlement position.

90. Applying this discount to the full valuation after allowing for contributory negligence gives £130,354 (75% of £173,805). In my judgment, that represents a realistic settlement figure for the underlying action. Notwithstanding the concerns Mr Ellis had about apportionment, there was also scope for the claimants to do better than this figure allows for on the issues of quantum, contributory negligence and apportionment. It seems to me that it would therefore fairly reflect the litigation risks faced by the claimants and the defendant insurers in the underlying claim.

91. It might have been argued for the claimants that this should represent the end point in the valuation of this claim. The observations in *Edwards* and *Perry* to which I have already referred suggest that the court might look at the settlement value as representing what was lost through the solicitors' negligence since a settlement inevitably takes account of litigation risks and prospects of success. Further support for this notion is to be found in the judgment of Neuberger J (as he then was) in *Harrison v Bloom Camillin* [2001] P.N.L.R. 7 at para. 85:

> "However, it may well be that the dispute between the parties, as to whether or not one is entitled to look at the possibility of the action being settled, may in many cases raise more of a hypothetical issue than a real one. Save in an unusual case, where there is actual evidence as to how the particular case may settle, it seems to me that the exercise the court would carry out, in deciding the likely settlement figure (if it concludes that the action is likely to have settled), is very similar to the exercise of assessing the likely measure of damages which would have been awarded by the court if the claimant had been successful in the action, and then reducing it by an appropriate fraction. After all, while I accept there could be special circumstances in some cases which would render the analogy inexact, there is a close similarity between the figure the parties to an action would have arrived at for the purpose of settling that action and the figure which the court arrives at when applying an appropriate fraction to reflect the uncertainties to the likely measure of damages if the claimant had won. In each case, the exercise ultimately involves assessing what the action is worth."

92. The claimants' pleaded case did not make any further discount at this stage. However, both counsel approached their closing submissions on the basis that there should be a further discount reflecting the prospects of actually achieving a settlement. I am not convinced that such a discount will always be required. If the court has assessed, with a high degree of confidence, the figure that the parties were likely to have arrived at for the purpose of settlement of the claim, it seems to me that there is a good argument for saying that represents the sum that should be awarded in the professional negligence claim. However, each case depends on its own facts and in the circumstances of this case I consider that Mr Viney's proposal that I should allow 80% of the settlement value to reflect the chance of achieving such a settlement

is again sensible and realistic. This is not a case where it can be said that there was (to quote Neuberger J) "actual evidence as to how the particular case may settle". Uncertainty remained. However, I have found that the claim was highly likely to settle. Having built other litigation risks into earlier stages of the assessment, I consider that a discount of 20% at this stage is entirely reasonable.

93. I therefore adopt Mr Viney's suggested approach to the assessment of the loss of chance by quantifying the full claim, discounting for contributory negligence and then applying a 25% discount for the apportionment risks and a further 20% for the settlement risk. Using the valuation I have arrived at after allowing for contributory negligence, this produces a final figure (before interest) of £104,283.

94. Having adopted that approach, I stand back and look at the assessment in a broader way. If the figure after discounting for contributory negligence is viewed as the full realistic value of the claim, the result that I have arrived at means that the claimants are recovering 60% of that. I consider that to be a fair reflection of the claimants' loss of chance in this case.

Interest

95. Provision will need to be made for interest. The parties have not yet addressed me as to the appropriate interest rate. Counsel invited me to decide the date from which interest should run at this stage and then to allow the parties an opportunity to seek to agree interest and/or to make submissions if necessary.

96. It is the claimants' position that settlement was likely to have been achieved by July 2013. While I consider it possible that the defendants would have acted quickly to avoid costs escalating, the need for coordination between insurers is likely to have added some time into the process and I consider that it is more realistic to assume settlement around the end of 2013, which would have been approximately 12 months after the issue of proceedings. It is, of course, impossible to be precise about the date but I consider it reasonable to adopt 1 January 2014 as the appropriate date for the purpose of the interest calculation.

Disposition

97. I have found that the claimants are entitled to recover damages assessed in the sum of £104,283 together with interest to be assessed from 1 January 2014. I invite the parties to seek to agree the interest calculation and any consequential orders. If they are unable to do so, provision will be made for the determination of any outstanding matters.