



22 October 2014

PRESS SUMMARY

McDonald (Deceased) (Represented by Mrs Edna McDonald) (Respondent) v The National Grid Electricity Transmission Plc (Appellant) [2014] UKSC 53

McDonald (Deceased) (Represented by Mrs Edna McDonald) (Appellant) v The National Grid Electricity Transmission Plc (Respondent) [2014] UKSC 53

On appeal from [2013] EWCA Civ 1346

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Reed.

BACKGROUND TO THE APPEALS

Between 1954 and March 1959 Percy McDonald attended Battersea power station in the course of his employment as a lorry driver for a firm known as Building Research Station to collect pulverised fuel ash. Between 1954 and January 1957 he was at the power station approximately twice a month but this fell to about twice every three months from January 1957. While at the power station as a “casual visitor” Mr McDonald went into areas where asbestos dust was generated by lagging work. The lagging work involved mixing asbestos powder with water in order to make a paste, as well as sawing preformed asbestos sections and stripping off old asbestos lagging.

Mr McDonald was diagnosed as suffering from mesothelioma in July 2012 and sadly died at the beginning of February 2014. His widow, Edna McDonald, took his place as respondent in the appeal. The National Grid Electricity Transmission Plc (“National Grid”) is the successor body to the occupiers of the power station. At trial, Mr McDonald alleged that those occupiers had been in breach of their statutory obligations under regulation 2(a) of the Asbestos Industry Regulations 1931 (“the 1931 Regulations”) and section 47 of the Factories Act 1937 (“the 1937 Act”). He also brought claims in negligence against the successors to his former employers and National Grid, but these claims were dropped before the matter came to the Supreme Court.

The trial judge dismissed all Mr McDonald’s claims. On appeal, the Court of Appeal allowed Mr McDonald’s appeal under the 1931 Regulations but dismissed his appeal under the 1937 Act. National Grid appeals to the Supreme Court in the first appeal and Mr McDonald’s representative cross-appeals in the second appeal.

JUDGMENT

The Supreme Court dismisses National Grid’s appeal and dismisses the cross-appeal. On the appeal, the decision was by a majority of three (Lord Kerr gives the lead judgment and Lady Hale and Lord Clarke give concurring judgments) to two (Lord Reed, with whom Lord Neuberger agreed). On the cross-appeal, the decision was by a majority of four to one, with Lady Hale in the minority.

REASONS FOR THE JUDGMENT

On the first appeal, the majority conclude that the 1931 Regulations apply to all factories and workshops processing asbestos, not just those dealing with asbestos in its raw, unprocessed condition. The clear wording of the Regulations indicated this, focusing as they did on the processes in question rather than the nature of the industry. [27, 98, 116] The Secretary of State made these Regulations to

counteract the harm that could be done by the manipulation of asbestos rather than focusing on any particular setting where this might happen [96, 117].

The mixing of asbestos during lagging work at the power station fell within the meaning of paragraph (i) of the Preamble to the 1931 Regulations. The Secretary of State was alive to the risk posed by mixing asbestos in settings other than a narrowly-defined manufacturing context [49, 124]. Lady Hale points out that this interpretation of “mixing” was compatible with *Cherry Tree Machine Co Ltd v Danson sub nom Jeromson v Shell Tankers (UK) Ltd* [2001] EWCA Civ 101, which the Supreme Court unanimously approves in this case [100].

Lord Kerr holds that a worker in a factory or workshop where processing of asbestos took place was within the scope of the 1931 Regulations, even if not mixing asbestos himself or directly employed by the occupiers of the premises where asbestos was being mixed. The Secretary of State made these Regulations under s. 79 of the Factory and Workshop Act 1901 (“the 1901 Act”), which empowered him to afford protection to workers not involved in the asbestos processing. The risk of injury which these Regulations sought to protect against arose from inhalation of dust or fumes. There was therefore no logical reason to exclude those who were liable to exposure despite not working directly with asbestos [53]. Lady Hale concludes that liability under the 1901 Act is imposed on occupiers (rather than employers) to protect people in the premises they occupied, therefore the question was whether a person was employed in the power station, not whether he was employed by the occupier [103-104]. Lord Clarke deems that Mr McDonald was “in a real sense” working for the purposes of the power station and agrees with Lord Kerr [127].

Lord Reed, with whom Lord Neuberger agrees, undertakes an extensive review of the background to the 1931 Regulations. They would dismiss the appeal on the grounds that the 1931 Regulations are not engaged as they are intended to apply solely to asbestos processing within the asbestos industry. They hold that the Regulations were penal legislation which should be construed narrowly [158].

Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed would dismiss the cross appeal. They agree that, while the rest of the statutory criteria are met, there is no sufficient evidence to rebut the Court of Appeal’s conclusion that Mr McDonald had failed to establish that a “substantial quantity of dust” had been given off by the mixing process, as required by s. 47(1) of the 1937 Act [90, 209].

Lady Hale would allow the cross-appeal on the grounds that there is evidence upon which it could be determined that a substantial quantity of dust had been given off [108-109].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html