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Case No: QB-2020-001072

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2023

Before:
Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between:

SADIE BRIGGS (Widow and administratrix of the estate of Brian Briggs)	**Claimant**
- and –	
DRYLINED HOMES LIMITED	**Defendant**

- -
- -

Simon Plaut (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Amarjit Rai (instructed by **Brindley Twist Tafft & James LLP**) for the **Defendant**

Hearing dates: 7, 8 and 9 February 2023

- -

Approved Judgment

(Circulated to parties in draft 12 February 2023)

DEXTER DIAS KC:

(sitting as a Deputy High Court Judge)

A. INTRODUCTION

1. This is the judgment of the court.

2. I deliver it in eight sections, as set out in the table below, to explain the court's line of reasoning:

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(B1234, §XX) refers to the trial bundle page and (internal) paragraph.

A bracket with a witness's name indicates oral testimony.

3. This is a claim for damages arising from Mr Brian Briggs contracting and dying from mesothelioma, an asbestos-related cancer. This is my judgment following the contested trial. It focuses exclusively on two critical - and ultimately decisive - findings of fact.

4. On 26 March 2017, Brian Briggs, a man aged 72, was found cold and motionless, slumped in the bathroom of his home in Cannock, not far from Wolverhampton in the Midlands. Mr

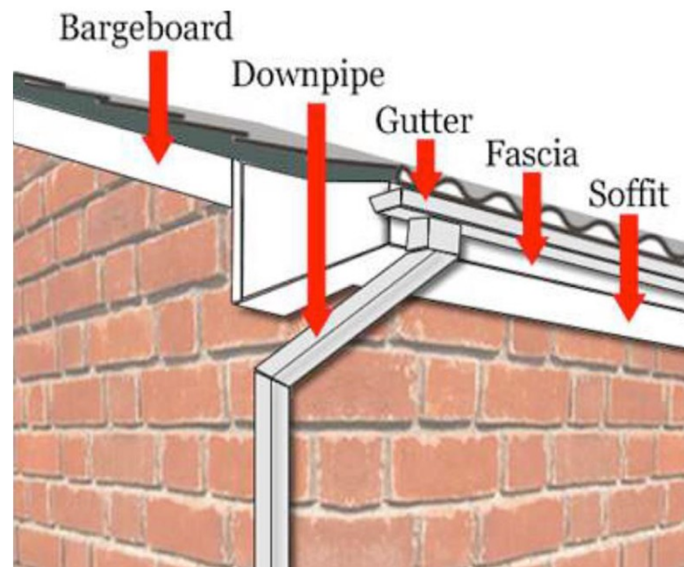
Briggs had died. His rapid medical deterioration came as a shock because prior to 2014, save for an atrial (heart) flutter he was managing with anticoagulant medication, Mr Briggs had been a fit man. He had worked for many years in the construction trade and mining. Naturally, his death was a cause of great distress to his wife Mrs Sadie Briggs, the claimant in this case. She, as executrix of her husband's estate and his dependent, brings a claim in negligence against one of her husband's former employers, Drylined Homes Ltd. ("DHL"). DHL engaged Mr Briggs to perform what is called "drylining" - putting up plasterboards - during house construction. This was between approximately 1975 and 1979. Therefore, this case examines what happened – or did not happen – well over 40 years ago in the house building industry when there was a mass of low-cost social housing construction to move inner city dwellers away from old and decrepit housing stock. In this sense, this case forms part of our collective social history.

5. The parties to the case are as follows: the claimant is Mrs Sadie Briggs, represented by Mr Plaut of counsel. Mrs Briggs brings the claim pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 in respect of her husband's estate and under the Fatal Accidents Act 1976 as his dependent. The defendant is Drylined Homes Ltd., represented by Mr Rai of counsel. DHL, while very active in construction the 1970s, is now largely dormant. I must say at the outset that the court is particularly grateful to counsel for their focused advocacy and spirit of cooperation throughout.

B. BRIEF BACKGROUND

6. In December 2015, Mr Briggs's health began to deteriorate significantly. He developed a bad chest infection and had to be taken by ambulance to the New Cross Hospital in Wolverhampton. The story is taken up by the medical expert in the case, Dr Andrew Fairfax. He notes that investigations of Mr Briggs's condition showed that he had a malignant mesothelioma. Mesothelioma is a cancer in the lining of certain organs of the body. It is caused by exposure to asbestos dust and fibres. Indeed, a single fibre can be sufficient to cause this lethal cancer. Presently, there is no known cure. Survival times after diagnosis vary and Mr Briggs was, as his wife says, "a fighter". Brian Briggs died 9 months after diagnosis following what Mrs Briggs calls a "terrible time", involving chemotherapy and progressive breathlessness. The cancer had spread to his pericardium, the sac around our heart, and to his right lung.

7. Before he died, Mr Briggs wrote a statement. He said that he was exposed to asbestos while working for the defendant company. Mr Briggs was a plasterer who was fitting plasterboards to new-build properties (hence the "dry" in drylining as opposed to wet plastering). The plasterboards did not contain asbestos. No one suggests they did. But when it rained, carpenters who were working outside to make roofs watertight would come inside. The carpenters were fitting what are called "soffits", lengths of board that close the gap between the fascia and the house wall or frame.



Source: HSE Asbestos Group meeting note. Open source and in public domain. Taken with permission from the report of an expert in the case, Christopher Chambers (B122, §3.27).[1]

8. As can be seen from the diagram, soffits are fitted horizontally and run parallel to the floor of the building. They are part of the "boxwork" around the bottom of the roof and so part of the "roof-trim". Now the etymology of the word makes sense: originally from the Latin, through Middle Italian and French, it means something "fixed beneath".[2]

9. If you cast your eyes upwards in the street, you will see soffits everywhere. Mr Briggs says that the carpenters would come inside to shelter from the rain, and then continue their work by sawing soffit boards to size near him. These soffits contained asbestos, he says. It was through these that the cancer came.

Common ground

10. The issues in dispute between parties narrowed significantly as the case proceeded. The common ground is reducible to a number of simple factual propositions:

(1) During the relevant times (approximately 1975-79), Mr Briggs worked for DHL as a dryliner;

(2) DHL owed him a duty of care;

(3) If he was exposed to asbestos dust/fibres during that work, the defendant was in breach of its duty of care towards him;

[1] It must be noted that the houses built in this case had sides that were "frames" and not brick walls as depicted. Nevertheless, the principle remains the same. This document can be found at https://www.arca.org.uk/Download/ALG%20memo%200312.pdf at §1.4.
[2] *Suffixus* (Latin), lit. fastened beneath → *soffite* (17th century French) → soffit. Merriam-Webster notes first recorded use as 1592.

(4) That breach of duty of care would have materially contributed to the mesothelioma he contracted (factual causation not disputed if breach proved);

(5) Mr Briggs died as a result of the mesothelioma.

11. There was very little dispute about the level of damages, and no contention whatsoever but that very serious damage was caused. The only question is whether DHL breached its duty of care to Mr Briggs by exposing him to asbestos fibres/dust and thus materially contributed to the mesothelioma. Parties agreed that the court should indicate its decision on the findings of fact sought and then take stock once done. I formulated and circulated the two factual issues between parties. They agreed the court's wording.

(1) Has the claimant proved on a balance of probabilities that when it was raining, carpenters came into buildings where Mr Briggs was working and cut soffit boards near him?

(2) Has the claimant proved that it is likely that the soffit boards being so cut contained asbestos?

12. Everything turns on these two questions of magnetic importance. It is essential to be clear about the issue these questions go to. In the conventional four-part rubric for proving negligence (duty-breach-causation-damage), these questions go solely to the question of breach. They are the two cumulative elements to the breach allegation. Therefore, this breach question is a "fact in issue" (see Lord Hoffmann in *Re H* [2008] UKHL 35 at [2]). The court's task is clear. The judge is not "a mere umpire", as Denning LJ (as then was) said in *Jones v National Coal Board* [1957] 2 QB 55, at 63-64. Instead:

> "[The] object above all … is to find out the truth … and in the end to make up [one's] mind where the truth lies."

13. This, naturally, is within the confines of the legal system and the evidence before the court (see, for example, *Phipson on Evidence*, 20th Ed. at §45-05). In the simplest sense, the case comes to this: if the claimant proves both issues, her claim succeeds. If she fails on either, her claim fails.

C. LAW

(Thirteen axioms of fact-finding)

14. My sole task is to make findings of fact in that search for truth. Thus, I limit my account of the law to that. My decision is fundamentally grounded in the following thirteen axioms of fact-finding that I have drawn together from a wide range of relevant authority, starting with the most elementary propositions:

(1) The burden of proof rests exclusively on the person making the claim (she or he who asserts must prove);

(2) Each determination is governed by the conventional civil standard of a balance of probabilities;

(3) The court must survey the "wide canvas" of the evidence (*Re U, Re B (Serious injuries: Standard of Proof)* [2004] EWCA Civ 567 at [26], per Dame Elizabeth Butler-Sloss P (as then was)); the factual determination "must be based on all available materials" (*A County Council v A Mother and others* [2005] EWHC Fam. 31 at [44], per Ryder J (as then was));

(4) Evidence must not be evaluated "in separate compartments" (*Re T* [2004] EWCA Civ 558 at [33], per Dame Elizabeth Butler-Sloss P), but must "consider each piece of evidence in the context of all the other evidence" (*Devon County Council v EB & Ors.* [2013] EWHC Fam. 968 at [57], per Baker J (as then was));

(5) The process must be iterative, considering all the evidence recursively before reaching any final conclusion, but the court must start somewhere (*Re A (A Child)* [2022] EWCA Civ 1652 at [34], per Peter Jackson J (as then was)):

> "… the judge had to start somewhere and that was how the case had been pleaded. However, it should be acknowledged that she could equally have taken the allegations in a different order, perhaps chronological. What mattered was that she sufficiently analysed the evidence overall and correlated the main elements with each other before coming to her final conclusion."

(6) The court must decide whether the fact to be proved happened or not. Fence-sitting is not permitted (*Re H* at [32], per Lady Hale);

(7) The law invokes a binary system of truth values (*Re H* at [2], per Lord Hoffmann):

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

(8) There are important and recognised limits on the reliability of human memory: (a) our memory is a notoriously imperfect and fallible recording device; (b) a greater confidence displayed by a witness does not necessarily correlate with a correspondingly more accurate recollection; (c) the process of civil litigation subjects the memory to "powerful biases", particularly where a witness has a "tie of loyalty" to

a party (*Gestmin SCPS S.A. v Credit Suisse (UK) Ltd* EWHC 3560 (Comm) at [15]-[22], per Leggatt J (as then was));[3]

(9) The court "takes account of any inherent probability or improbability of an event having occurred as part of the natural process of reasoning" (*Re BR (Proof of Facts)* [2015] EWFC 41 at [7], per Peter Jackson J); "Common sense, not law, requires that … regard should be had, to whatever extent appropriate, to inherent probabilities" (*Re H* at [15], per Lord Hoffmann);

(10) Contemporary documents are "always of the utmost importance" (*Onassis v Vergottis* [1968] 2 Lloyd's Rep. 403 at 431, per Lord Pearce),[4] but in their absence, greater weight will be placed on inherent probability or improbability of witness's accounts:

> "It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts." (*Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [80], per Moore-Bick LJ);

And to same effect:

> "Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence" (*Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [50], per Asplin, Andrews and Birss LJJ, jointly).

(11) The judge can use findings or provisional findings affecting the credibility of a witness on one issue in respect of another (cf. *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408).[5]

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[3] The *Gestmin* principles approved variously (but see next footnote), including *R (Bancoult No.3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 – see Lord Kerr at [103], where they were said to have "much to commend them"; however, the Court of Appeal subsequently stated that *Gestmin* is "not to be taken as laying down any general principle for the assessment of evidence … [instead] it is one of a line of distinguished judicial observations that emphasise the fallibility of human memory" (*Kogan v Martin* [2019] EWCA Civ 1645 at [88-89], per Floyd LJ).

[4] It must be remembered that *Onassis*, like *Gestmin*, was a dispute about recollection of business conversations, where typically there will commercial documentation. Ryder LJ sounds a necessary warning note about "simply harvesting obiter dicta expressed in one context and seeking to transplant them into another" (*Re B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371 at [23]).

[5] At [120], per Males LJ, "… once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed." A dishonesty case, but I discern no valid reason that a different kind of impairment to credibility, such as unreliability or inaccuracy, is not capable of the same approach. It is an application of the principle of judging evidence in the context of all other evidence.

(12) However, the court must be vigilant to avoid the fallacy that adverse credibility conclusions/findings on one issue are determinative of another. They are simply relevant:

> "If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything." (*R v Lucas* [1981] QB 720, per Lord Lane CJ);

Similarly, Charles J:

> "a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B..." (*A Local Authority v K, D and L* [2005] EWHC 144 (Fam) at [28]).

(13) Decisions should not be based "solely" on demeanour (*Re M (Children)* [2013] EWCA Civ 1147 at [12], per Macur LJ); but demeanour, fairly assessed in context, retains a place in the overall evaluation of credibility: see *Re B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371, per Ryder LJ:

> "a witness's demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable" (at [23]); so long as "due allowance [is] made for the pressures that may arise from the process of giving evidence" (at [25]).

15. These were the principles I used to analyse the evidence, to which I now turn.

D. EVIDENCE

16. My approach is to follow what the Court of Appeal said in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407. McFarlane P stated at [58] that a judgment "not a summing-up in which every possibly relevant piece of evidence must be mentioned" (Proposition (4)). Thus, I focus on what is important. The trial bundle runs to 692 pages. There were extremely helpful skeleton arguments from counsel and I heard succinct oral submissions at the conclusion of the evidence. Two statements were read following hearsay notices. First, that of Mr Briggs. Second, that of Mrs Jill Parkes, who worked for the defendant company in an office capacity. Sadly, Mrs Parkes is unfit to testify being seriously unwell.

17. The witnesses called live were (in order):

(1) Sadie Briggs (wife of deceased and claimant);

(2) Bruce Vine (supervisor of some sites at which the defendant company was contracted in the 1970s to perform drylining services);

(3) Kenneth Parkes (sole director of the defendant company);

(4) John Parkes (brother of Kenneth Parkes, carpenter working for DHL at relevant times).

18. With the court's permission, all lay witnesses gave evidence remotely. It was entirely unnecessary for them to come to the Royal Courts of Justice to testify. They are all of advanced years. Kenneth Parkes is living with Parkinson's Disease.

19. There were two experts instructed. They are expert consultant occupational hygienists instructed to assist the court on breach and causation through asbestos exposure. Christopher Chambers was instructed by the claimant. Martin Stear by the defendant. Their reports run to 205 pages together. After the first day of the trial, I invited counsel to consider (1) what *actually* remained in dispute between experts; (2) what they could authoritatively speak to beside exposure. The reason for this enquiry was that although in the reports both experts gave various opinions about the facts and building practice, neither were instructed to do so, and by profession they are not experts on building construction - certainly not in the mid-1970s. Indeed, Mr Chambers was only born then and had not worked in construction, his background being in health and safety and compliance (after an initial spell in the police). I invited counsel to reduce what could be gleaned from the reports to a series of propositions. They did this. It is below.

20. I also received two medical reports from Dr Fairfax. These post-dated Mr Briggs's death; Dr Fairfax never met him. I begin by outlining the evidence of Mr Briggs.

(i) Claimant evidence

Brian Briggs

21. Due to his death in March 2017, the court was engaged in assessing Mr Briggs's evidence in his absence. This was an exercise in what Mr Plaut graphically described as "bringing him back from the grave". Therefore, Mr Briggs's evidence was admitted as hearsay under the CPR Part 33 and the Civil Evidence Act 1995 as evidence of the matters stated in it (i.e. as to truth of the factual assertions). This meant that Mr Briggs could not speak to the statement or amplify it. It meant that the defendant could not cross-examine him about it. Neither consequence is satisfactory. It is the best we can do. We must get on with it.

22. Mr Briggs's account necessarily remained untested in cross-examination. But it can and must be evaluated using the canons of probability/improbability and in the context of the rest of the evidence (*Re H*; *Devon County Council*). I emphasise that the defendant does not allege that Mr Briggs was inventing lies in his statement. As Mr Rai accepted, "no doubt Mr Briggs was doing his best". The defendant's explanation is that Mr Briggs's evidence cannot stand in light of the defendant's evidence and indeed the dictates of logic and common sense. What Mr Briggs said about his work for DHL in the mid- to late-1970s is as at D36, §43-44. This is the crucial evidence in the claimant's case:

> "I recall that the carpenters with whom I would work alongside would routinely be cutting up asbestos boards to prepare soffits. I remember

> in this job that the sheets were 8 x 4 [feet] and they were being cut with a handsaw.
>
> If it were raining then the cutting would take place indoors and there were times when I would be working alongside carpenters who would be undertaking this type of cutting in my presence and within proximity so that I would undoubtedly inhale the dust from the cutting."

23. I am quite satisfied that if this evidence is accepted in its material respects about his work with DHL, it provides, as Mr Plaut put it, "a prima facie case". Indeed, if I accept the contents of these paragraphs, Mrs Briggs's claim would be proved on breach and, given the concessions, completely.

Sadie Briggs

24. Mrs Briggs gave evidence remotely from her home. I disagree with the defendant's submission that Mrs Brigg's evidence must be treated with "an abundance of caution". I found her to be an honest witness who frankly accepted that prior diagnosis she had never discussed asbestos with her husband. It was just not something that had featured in their conversations. Therefore, her following evidence must be set in that critical context (D38, §6):

> "Brian was exposed to substantial quantities of asbestos dust arising from the cutting of asbestos board by colleagues in his proximity."

25. This adds nothing of significance to Mr Briggs's evidence, and no doubt this passage merely replicates what he told her at some point after diagnosis and cannot be some contemporaneous account. Her evidence chiefly went to quantum. I note that, quite understandably, Mr Plaut did not rely on any part of her evidence in closing submissions about the two contested issues.

(ii) Defendant evidence

Kenneth Parkes

26. Kenneth Parkes is the sole director of DHL, a company now in the process of being wound up. In the 1970s, the company was contracted to provide drylining services for "vast projects" of house building by local councils (K. Parkes §11). The local authorities contracted main construction firms like McAlpine and McLeans, and these in turn subcontracted out to specialist tradesmen such as DHL. During this period DHL engaged Mr Briggs to do drylining work.

27. Kenneth Parkes is living with Parkinson's Disease. At times, he would need a sip of water or just needed to pause. However, I found him remarkably switched on and present. He was very able to stand his ground and dispute with counsel ("I'm telling you, drylining had nothing to do with soffits"). He picked up counsel on getting the name of his company wrong by the factual inexactitude of leaving out the "Ltd.". I got no sense that his condition affected his ability to recollect events. I found that generally he had a clear recollection, although once he lost track of his answer and asked for the question to be repeated.

Jill Parkes

28. In the 1970s, Mrs Parkes acted as the company secretary for her husband's company. She did not give evidence because, regrettably, she is seriously ill. As with Mr Briggs, her evidence was admitted as hearsay. However, since Mrs Parkes "had very little to do onsite" (J. Parkes §5), she could add little to the contested factual matters. Her statement set out that she could not recall any time when she visited sites that she saw different tradesmen working alongside one another or materials being cut "in the same rooms or even in the same vicinity" (§6). I place no weight on this. By her own concession, she only went out onsite on "3 or 4 occasions" (§5). That is far too small a sample size to be of any probative value.

Bruce Vine

29. Mr Vine was a site supervisor for McLeans, one of the main construction companies involved in these large projects. McLeans regularly contracted DHL to do the drylining of the properties they were building. That is how Mr Vine came across Brian Briggs in the 1970s. I found Mr Vine's evidence particularly persuasive. He plainly knew his stuff. A prime example was when he was challenged by counsel for the claimant about the trimming soffit boards to width. This was not something addressed in his witness statement. But immediately ("spontaneously" as Mr Rai submitted), Mr Vine was able to give a coherent and convincing account about how there was a certain "tolerance" as soffits on their inner aspect would rest atop the building frame/wall. It had the ring of truth. He spoke with authority. It is entirely clear why Mr Vine was promoted to site supervisor. He was thoughtful and measured. This is not an assessment of demeanour equating to truthfulness. I place little weight on that. I note the research results cited by Leggatt LJ in *R (SS)(Kenya) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [39]:

> "… social scientists have tested the legal premise concerning demeanor as a scientific hypothesis … According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."[6]

30. But further on at [41], Leggatt LJ acknowledged that it was "perhaps undesirable to ignore altogether the impression created by the demeanour of a witness giving evidence". This must be right. It is a question, ultimately, of balance and judgement – before judgment. I explicitly direct myself as Macur LJ recommended (albeit in a family appeal) in *Re M (Children)* [2013] EWCA Civ 1147. She said at [12] that judges:

> "should warn themselves to guard against an assessment solely by virtue of their [i.e. witnesses'] behaviour in the witness box and to expressly indicate that they have done so."

31. I do. Although Mr Vine gave evidence with great assurance and confidence, I set little store by that presentational impression. What was more impressive was his command of detail – the substance. Mr Vine accepted the limits of what he knew and saw and did not. He gave evidence that was nuanced, consistent and that made sense when measured against the canons of probability (*Re H*). He was also in a conceptually different position to either Mr Briggs or

[6] OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. See also Lord Leggatt, speaking extra-judicially, "Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony", At a Glance Conference, 12 October 2022. https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf

Mr Kenneth Parkes, who are most connected to the parties in this case. They each have a powerful incentive to advance a partial version of the past. However, Bruce Vine did not work for DHL. He worked for the main contractor McLeans. It must be recognised that knew Mr Parkes and was "quite close to Mr Parkes in the early days". That is many decades past. However, subsequently they "went their separate ways". He "got in touch again" when he heard that Mr Parkes had been diagnosed with Parkinson's. Therefore, although there was a historic connection between them, Mr Vine did not have any direct or personal interest whatsoever in the outcome of the litigation. To that extent, he provided evidence from a position of qualified and quasi- (although not complete) independence.

John Parkes

32. John Parkes did not add much to the evidence. I found no inherent basis to doubt his testimony, to the extent it was relevant. However, the weight I placed on his evidence was reduced by the fact that he is Kenneth Parkes's brother with precisely the strong "ties of loyalty" mentioned in *Gestmin*.

Overall assessment of defendant evidence

33. I must emphasise that the evaluations of the evidence provided here are just by way of overview. What is of real significance is the detail, how the various strands of evidence fit together – or not (looking at all the "compartments" of evidence together: *Re T*). That forensic assembly is the function of the analysis sections to come. It is important to put all the pieces together and I detail the relevant parts of the defendant evidence on the two issues as I analyse them. As a general assessment of defendant's witnesses, however, I am prepared to agree that overall they did not stubbornly "dig their heels in", as Mr Rai urged me to accept. They did make concessions. John Parkes agreed that he had never actually seen Mr Briggs, to his recollection. Kenneth Parkes agreed a possibility of carpenters cutting soffits indoors in the rain. I must say more about this last answer in due course

Agreed expert evidence

34. The expert evidence was reduced to the following propositions. I made plain to counsel that although I read both reports in their entirety, given this in-trial agreement, I would not stray beyond the perimeters of this joint position. The various other opinions and speculations the experts had offered, I ignored. They were no longer relevant.

35. The summary is as follows (court clarifications in square brackets):

    1. If it is accepted *[found as a fact by the court]* that the Deceased was present inside houses when asbestos boards were cut (in any way) then it is likely that he <u>would</u> have been exposed to asbestos dust.

    2. If that occurred, such exposure could and should have been prevented *[proved breach of duty]*.

    3. If it is not accepted that he was present inside houses when asbestos boards were cut, he <u>would not</u> have been exposed to asbestos during the course of his employment with the Defendant in the manner he alleged *[no breach]*.

4. Asbestos boards were widely used as soffit boards to houses at the time of the alleged exposure of the Deceased *[possible availability accepted]*.

5. The Health & Safety Executive Asbestos Liaison Group (ALG) Memorandum 03/12 '*Removal of asbestos soffits'* suggests that 40% of boards historically fitted contained asbestos and the remaining 60% of soffits are likely to have been predominantly wood-based materials. This document does not indicate either way whether asbestos soffit boards were actually used on the developments worked on by the Deceased *[general prevalence evidence]*.

6. Soffits could be fitted in two ways. Either they were flush between the external wall and the fascia. If so, it is more likely that they would need to be trimmed along their width. Alternatively, they could be fitted so that they sat on top of the external facing wall, in which case cutting to width is unlikely to have been required.

7. Whether or not the soffits were trimmed along their width in this case is a matter for the court *[part of Issue 1 determination]*.

8. If soffit boards were cut along their length only that would be a very short duration task.

E. ISSUE 1

(Soffit-cutting indoors)

General analytical approach

36. The two findings of fact sought could be taken in either order. But the court has to start somewhere (*Re A*). While the setting down of a judgment must be a linear activity, I have considered all the evidence globally and holistically (*Re U, Re B; Devon County Council*). I take Issue 1 first, because parties did. I reach a provisional, but not final, conclusion on it and then consider Issue 2 before confirming or varying that provisional assessment (*Re A*). I could have dealt with the issues in reverse order. It matters not. If the analysis is right, one reaches the same conclusion whichever order adopted. My process was iterative and recursive, sense-checking as I proceed at each stage.

37. No contemporaneous documentation from the 1970s has been put before me. In the absence of such material, I place greater weight on the probability or plausibility of a claim – from whichever corner it comes (*Jafari-Fini; Natwest Markets)*.

Eight necessary sub-issues

38. Put shortly: did carpenters come inside when it was raining and cut soffits near Mr Briggs? I have identified the following eight sub-issues the court must ask and answer to determine whether soffits (of whatever material) were so cut:

(1) What was the system of construction adopted in the builds that Mr Parkes engaged Mr Briggs on in the mid 1970s?

(2) What is the purpose of a soffit?
(3) At what construction stage do soffit-fitting and drylining take place?
(4) What was the width of the soffits used in the construction work?
(5) Did the soffits need cutting?
(6) Where would soffits habitually be cut?
(7) Was it practical to cut soffits indoors alongside drylining?
(8) Would soffit-cutting take place indoors when raining?

On (1): System of work

39. The defendant engaged Mr Briggs on a number of projects that were generally commissioned by local councils (K. Briggs §§11-12) or local housing associations (Vine §7). These were "vast" projects involving the construction of hundreds of low-cost, social housing residential units. The three sites were at Cannock, East Hayes near Daventry and King's Norton. In total, there were approximately 1000 properties being constructed. The work had to be "rigorously managed" (K. Briggs §11) and "organised very efficiently" (Vine). There was urgency. This pressure of time came from the local authorities and reflected government policy priorities at the time which were to rehouse residents of the inner cities while older housing stock was being demolished (Vine). To meet deadlines, there were what Mr Vine called "critical planning meetings". As a supervisor for McLeans, he was aware of the bar charts that documented the progress of various properties. Mr Vine said that the charts kept track of "when the scaffolding went up, when the roofs went on, each stage of construction to completion". The supervisors had time and motion studies so they knew how long it would take a team ("gang") of tradesmen to complete any particular task. The houses were constructed in "batches", with groups of houses undergoing a particular phase of the construction process together. The houses were in rows or blocks of three, four, five or six. It would depend on the number of bedrooms (and thus size of house). The process was methodical and carefully orchestrated. It was, as Mr Vine put it, "like working in a car factory".

40. This was what Mr Vine called "pre-fab" construction with the materials being supplied like "pre-packed furniture". He agreed that the construction of many similar properties in batched groups was like a giant Ikea assembly. John Parkes said, "Everything was pre-cut and fitted." I must point out that Mr Vine, working as he did for McLeans, did not supervise all the sites where DHL employed Mr Briggs. So allowance must be made for that. But Kenneth Parkes did visit the sites generally as part of his role, not being "office-bound", as he put it. He went "to the different sites".

41. Thus I find that this was highly "regimented" construction, as Mr Vine styled it.

On (2): Purpose of soffits

42. Soffits help make the building watertight. They do that by being part of the boxwork design to close off the space between the fascia dropping vertically from the roof trusses and the "frame" (what lay people would think of as the wall, only it was not brick here). By sealing off that gap, the soffits prevent draught, bird ingress and rainwater entering. As Mr Vine pointed out, in later times there would be small breathing holes left to prevent condensation inside. That illustrates how effectively soffits acted to hermetically seal the roof and ensure the building is watertight.

43. There is no dispute about the function of soffits. I find that they were an essential element in making the building watertight.

On (3): Stages of soffit-fixing and drylining

44. The construction of a building takes place in a series of careful steps. They were set out in detail by Mr Vine in his testimony:

> "First, there was a concrete slab [in the ground], then the timber frame was placed on the slab, then the scaffolding would be erected and then carpenters would erect the panelling, then the roof joists would be fitted, then fix the roof trusses, then the soffits and fascias would go on, then the guttering, then the roof tiler would lath and felt the roof to add the roof tiles. Any work that had to done at high level would be done on the scaffolding. Then the scaffolding is taken away. Then the first fix carpenters would go into the property and fix the stairs and floors and internal walls, then the plumbing and electricians – the electricians would not go in if the building was not watertight. The second fix would be the dryliners to do the finishing to the walls et cetera. They would tape, board and sand off. You could not carry out the drylining if the building is not watertight as the plasterboard would disintegrate, so it had to be watertight to prevent any rainwater getting inside."

45. Mr Vine's account of construction sequence is not disputed. Therefore, there were three essential stages:

(1) Foundations to watertightness – exterior work;

(2) First fix – interior work;

(3) Further interior work, including drylining.

46. There was thus a gap in the phases between the exterior work in the initial phase, including soffit-fixing and the internal drylining in phase three (second fix). Mr Briggs's evidence is that the carpenters he "would work alongside" would cut soffit boards inside near to him when it was raining. However, I accept the evidence of Mr Vine about the careful sequence in this pre-fab construction, which has not been challenged. The soffit boards would not have been cut (if cutting was necessary – a disputed issue: see below) for the building that Mr Briggs was working on at the same time he was working because the soffits would have already been fitted. This comes from the logic of the defendant's evidence cumulatively. Kenneth Parkes said, "You wouldn't put up plasterboard if the roof is not on. A house without a roof on is not ready for drylining." Mr Parkes ran a drylining company. He knew. The building needed to be tiled and the house watertight first. He said directly and firmly to counsel about the sequence of work that "drylining had nothing to do with soffits."

47. John Parkes, Mr K. Parkes's brother, worked as a carpenter on various of DHL's construction projects. However, he never came across Mr Briggs. He attributes that to their differing roles. John Parkes would fit stairs and internal walls (phase 2, first fix work). He said, "That's why Mr Briggs was never in the same place as me - the plasterers needed the

carpenters to finish before they began." He did not speak about cutting and fixing soffits. He was speaking about the difference between construction phases 2 and 3: the first fix (internal carpentry) and second fix (plastering and drylining). He added that when he did his work, "the roof would be finished, and if the roof was finished, the soffits would be finished." There was "not an occasion when the soffits were fitted after the roof was tiled." This lends further support about the gap in time and process between soffits and drylining.

48. As the evidence developed, Mr Plaut began to suggest to witnesses that soffits perhaps were brought from a building undergoing stage 1into a watertight (roof-sealed, soffit-fitted) building in stage 3 (where Mr Briggs would have been plastering). Mr Rai submits, with some justification, that this was because the evolving evidence "drove" Mr Plaut to this new fallback position. That might be the case, but in itself does not invalidate the possibility. It was reasonable for Mr Plaut, fixed as he is with the statement of Mr Briggs and not able to receive updating instructions, to seek to harmonise the written account of the Mr Briggs with what was unmistakably emerging from the evidence.

49. I find that the drylining that Mr Briggs was working on for DHL was a stage 3 task. It took place within any particular building at a materially different time to the much earlier fitting of the soffits, a stage 1 task. Indeed, the drylining would not begin until the soffits were fitted and the building watertight.

On (4): Soffit width

50. Both parties accept that the soffits were 8 feet long. That is one element that supports Mr Briggs's recollection of detail. The dispute is about width. Mr Briggs states that the soffits were 4 feet wide. Mr Plaut stated in submission that the claimant continued to "rely on this evidence". The defendant's evidence flatly contradicted it. Mr Vine stated that "The soffits came pre-cut to width: 3, 6 or 8 inches … depending on the type of property being erected." About this, Mr Vine gave nuanced and detailed evidence unhesitatingly.

51. This issue is of significance for both parties. If the soffits were 4 feet wide, then there is great force in Mr Plaut's argument that it would take more time to cut them right along the 8-foot length. That in turn makes it more likely that when raining carpenters would bring them indoors to cut - it would not be a quick operation. It would take time. That would justify making the effort to bring the soffits inside to cut. In its assessment of probabilities, the court is constantly searching for factors that make a particular proposition more probable. Soffits with a width of 4 feet increases the likelihood of indoor cutting.

52. However, it is precisely the laborious nature of the cutting operation necessitated by cutting down 4-feet-wide soffits that makes it unlikely to be correct. If the soffits were that wide, it would mean that *every single soffit* would have to be cut to width without exception. One only has to think about the two rival suggestions. On the defendant's case, soffits can be lined up along one side of the building. There would be lengths of 8 feet. If the building side were, say, 30 feet across, there would be three soffits at full length and then a fourth one trimmed to length from 8 feet to 6 feet. That would take according to Mr Vine "a matter of minutes". As Mr Rai pointed out, that may be a generous estimate and it is likely a few inches' trim across the width would be far quicker. But I am prepared to judge the issue on the "matter of minutes" postulate. With a building with four sides, four soffits would need to be trimmed, the end one for each side. Contrast this with the claimant's case. Here every single soffit would have to be cut down its *entire* length, all 8 feet of it. The actual soffits (as opposed to the boards) would need to be either 3, 6 or 8 inches – I heard no evidence contrary

to this and what Mr Vine said was not challenged. Therefore, the 4-foot-wide soffit boards supplied would be too wide by a factor of 6 to 16. I have found, and it is not disputed on sub-issue 1, that these projects were rapid-build constructions with the materials supplied akin to large furniture assemblies. There was a groove already set into the inside of the fascia. The outer edge of the soffit slid into that. Thus, steps were taken to make this an efficient process. Yet, and at the same time, the claimant must contend that each and every soffit had to be cut from a very wide board into very narrow strips. It makes little sense. It is inconsistent with rapid construction. Having to cut every soffit board so substantially - time and again - goes against the plan of pre-fabricated materials ready for assembly. It sound improbable in *Re H*, *Re BR* terms.

53. As a cross-check, now calculate the amount of cutting needed to be done. Imagine a building with four sides of 30 feet and needing 3-inch soffits. Think about the first side. On the claimant's case, each four-foot soffit of the four necessary soffits would have to be cut its entire 8-foot length into 3-inch strips, and then the final soffit also cut to length at 6 feet. So total cutting is 30 feet and 3 inches (3 x 8, 1 x 6 + 3 inches). Contrast that with the defendant's case: the soffits already come pre-cut to width (with a certain tolerance allowed for by resting on the frame/wall). Three soffits slot in without alteration. The final one has to be cut to length at 6 feet across its 3-inch width. So total cutting is 3 inches. This is repeated for all four sides. On the claimant's case the total cutting is 121 feet (4 x 120 + 4 x 3 inches). On the defendant's case, it is 12 inches (4 x 3"). The difference in cutting is 121: 1.

54. For these rapid-build construction projects, it is manifestly clear which is more likely. There is force in the defendant's submission that the chances of 4-feet soffit boards being cut to width "are pretty much non-existent". I agree. Therefore, I find that the soffits were not likely to be four feet wide. I find that they were likely to be between 3 and 8 inches. What follows from this finding?

55. As Mr Plaut accepts, having pinned the claimant's colours to this mast, an adverse finding affects the credibility of Mr Briggs's evidence. I emphasised to Mr Plaut that I did not consider it to be fatal to the claimant's case (adapting the dictum of Charles J on "point A and point B"). Mr Briggs may have been mistaken about the width and still correct about (a) the soffit boards being brought inside and (b) being asbestos. But this sub-issue was hotly contested precisely because the ramifications of a finding against Mr Briggs on it would impact his reliability and credibility. I find that Mr Briggs's evidence about width is wrong. It is an important detail. He is plainly incorrect about it. This does adversely impact his overall reliability (on adapted *Arkhangelsky* grounds).

On (5): Need to cut soffits

56. Mr Briggs is not explicit about in what way the soffits were cut, whether to length or width or both. On his written evidence about board dimensions, they must have had to be cut to both. There is no dispute between parties but that the soffits had to be cut to length. But what was the position about the width, given that I have found that the boards were probably between 3 and 8 inches wide?

57. Mr Vine stated that there was a groove within the inside face of the fascia that the outer edge of the soffit fitted into, while the inner side of the soffit rested on the wall/frame and could overhang it. Thus, there was what Mr Vine called "a tolerance". This evidence by Mr Vine was not contradicted by any other evidence save for one reading of Mr Briggs's evidence that the boards were cut by sawing. However, it is also possible from Mr Briggs's evidence that

the boards were only approximately cut and in fact did rest with an overhang across the top of the frame/wall. The difficulty for the claimant is that on this Mr Briggs's statement is silent. Thus, I am prepared to accept Mr Vine's detailed and convincing evidence about this.

58. Mr Parkes was asked by claimant counsel how it was he knew that soffits were pre-cut (to width). He instantly replied, "Because I worked in building long enough and it was common knowledge." John Parkes confirmed that "soffits were cut to length only." On this point, I am conscious of the *Gestmin* limitations of memory, particularly reaching back for far into the past. But the evidence of from the defendant witnesses was consistent. I judge that there is a distinction about limitations on memory where one tries to recollect one incident from the past and some details in it, and this recollection which is about something that these men encountered hundreds of times over many years.

59. I then assess that conclusion finding in the context of the other evidence. It makes far more sense that these boards were pre-cut to width and then needed just trimming to length, with the issue of width removed as the tolerance of the overhang would allow for quick fitting without further cutting in that direction. I accept the tested evidence of the defendant witnesses. I prefer it to Mr Briggs's untested evidence. I find it probable that the soffit boards were cut to length but not to width.

On (6): Where soffits would habitually be cut

60. Mr Vine said that soffits would be cut to length on scaffold. This is because soffit-fitting was an external job. They would be measured to length up on the scaffold beneath the roof trusses and cut on scaffold there. As a general rule (not yet dealing with the issue of rain), it made no sense to bring the soffits inside to cut them. Mr Vine explained that it was a simple job that took "a matter of minutes". It took place in situ on the scaffolding once the exact length for any particular end soffit board was known. This point is precisely why it was important for the claimant's case to assert that the soffit boards were 4 feet wide. Once that issue is lost, as it has been, then it makes it far more likely that the soffit boards would be trimmed to length in a quick operation in situ up on the scaffolding at the spot they were to be fitted.

On (7): Practicality of indoor soffit cutting

61. The soffit boards were long and cumbersome items. Did it make sense to cut them indoors where dryliners were cutting up and fitting plasterboards? As Kenneth Parkes said, "a trade like ours [drylining] uses a huge amount of materials. We had two arctics [delivering boards] a day - that's a lot of plasterboards."

62. It must be remembered that these were not large properties being built, but small social housing premises. The rooms, as Mr Vine said, had typically 10 foot 6 inches by 12 feet dimensions. That was of course just indicative, giving an idea of order of magnitude. Given the limitations of space, it becomes improbable that there would be cutting of plasterboards for drylining and soffits to be happening alongside each other in a relatively confined space. Mr Rai makes the submission that even if carpenters came into a watertight building in the rain – something he does not accept – why would they choose to work in a room where other tradesmen were busy drylining? Would they not choose to go to an empty room? Both sets of men, on the claimant's case, would be in these relatively small rooms with 8 feet long soffit boards and cumbersome plasterboards. I cannot accept the submission of Mr Rai that to have two trades in the same room "defies logic". But I do find that it would have made working very difficult. It would require some strong imperative to resort to this course.

63. Therefore, I find that it was not practical to cut the soffit boards in the same room where other people were drylining. It was not, I emphasise, impossible, but the question is whether it is practical. I find that it is not.

On (8): Indoor cutting of soffits when raining

64. Drylining would take place far later than soffit cutting/trimming for any particular building and houses were built in carefully staged batches. If there was light rain, the work could continue outside – the men had protective clothing (Vine). But if the rain was so heavy that it was not safe for work to continue outside, it seems unlikely that soffits would be brought from one batch of houses in initial (stage 1) construction to another batch of houses in the final (stage 3) stage just to save the "matter of minutes" it would take to cut the soffit to length. The soffits would have to be measured to length up on scaffold, in any event. They would have to be fitted up on scaffold. I fail to be convinced that it is likely for the sake of a few minutes sawing for any particular soffit, the board would be either brought down from the scaffold where it was being marked to length, or if it were just the measurement taken, carried to a house in a different batch in an entirely different stage of construction so it could be cut inside. What would happen once it was cut? If the rain was so heavy that it prevented exterior work, the freshly cut soffit could not be fitted. This elaborate process strikes me as being inherently implausible given the total circumstances of this case.

65. To succeed, the claimant's case would have to be that Mr Briggs was working in a batch of properties that were at stage 3 (second fix, including plastering/drylining) while there were carpenters in another batch who were at stage 1, fitting soffits with the roof unfinished. There is no evidence whatsoever about how the various stages were organised and whether stage 1 builds and stage 3 builds were close together in these vast projects. It was, of course, open to the claimant to ask the defendant witnesses about this. That did not happen. I cannot speculate. Therefore, I must proceed on the basis of a total lack of evidence about how the staging took place geographically. It seems to me, therefore, to conclude that there were stage 1 and stage 3 builds reasonably close together, or sufficiently close to justify taking 8 feet soffit boards from a stage 1 location to a stage 3 location to save the few minutes it would take to trim them to length, is completely conjectural. The court cannot speculate. It is for the claimant to prove her case. On this point, she has not laid any evidential foundation to suggest that this was probably true.

66. I also draw on the convincing evidence of Mr Vine that in his 50 years working in construction, from the age of 15 until retirement around 65, he never saw soffit boards being brought inside in the rain to be cut. Kenneth Parkes testified that carpenters did not cut soffits inside. That evidence was supported by the fact that he was not office-bound but, as he put it, "went to different sites rather than staying in the office". John Parkes said that Mr Briggs was wrong and "I don't recollect it [indoor soffit-cutting] personally." John Parkes was, of course, a carpenter. It was carpenters who Mr Briggs said cut the soffits indoors.

67. I now evaluate the five principal points that Mr Plaut relies upon, setting out the submission and then providing the court's response (a.):

    1. "None of the defendant witness statements address the question of what happened when it rained even though Mr Briggs's statement served with letter of claim makes it plain that rain was the explanation for the indoor cutting."

   a. This is factually correct. However, the defendant statements refuted the claim of indoor cutting. Their testimony was consistent with that. Mr Vine in particular explained how if the weather was too bad to work, he would send the outdoor tradesmen home ("offsite").

2. "This was fast-paced piece work, and the more the men did, the more they would get paid. This would provide an incentive to carry on working indoors."
   a. This must be judged against the implausibility of taking a soffit from a stage 1 build to a stage 3 section to trim the 3-8 inches of the end of the end board for any side, which would take a matter of minutes. Further, the measurement for the trimming would have to made up on the scaffold. Thus, the soffit, if so cut, could not be fitted if it were raining heavily.

3. "If the work was never shut down, as Mr Vine said, then the work would have to be brought inside."
   a. Mr Vine's evidence is importantly different to this characterisation. He testified, "I never came across *a site* that totally shut down. There were always things that can be found to do" (emphasis provided). That must be right. But it does not provide convincing support for the cutting of soffits inside, which suffers from all the improbabilities detailed above.

4. "It is human nature that men would be likely to want to work inside when it was raining." Many of these tradesmen were no doubt experienced workmen - one just has to look at the lengthy work record of Mr Briggs himself even by the time he was working for DHL. As Mr Vine said, the men had protective clothing to permit working in light rain. If the rain was too heavy, he said he would send them home on their request. Once more, this suggestion on behalf of the claimant does not begin to address the inherent improbability of soffit cutting inside, given the swiftness of the length-trimming operation, the stage 1-stage 3 problem, and the impracticality of sharing restricted workspace with dryliners.

5. "Kenneth Parkes accepted that occasionally men would cut soffits inside."
   a. Kenneth Parkes agreed that, as Mr Plaut submitted, there "would be occasions" when soffits would be cut inside in the rain. I have carefully reviewed Mr Parkes's evidence. What in fact he said, and then very grudgingly, was that "a carpenter may bring a soffit board inside in the rain in 5 out of 100 builds". But he had also said earlier and in terms that "it would not happen … because they needed to get the boards onto the top joists onto the roof. So they could not be inside and then put them up outside as well." My strong impression, having seen the way Mr Parkes spoke about the 5/100, was not that this was something that *had* actually happened. He said "may", not did. The court must look at his answer in context (*Devon County Council*). It was given more in the sense of conceding some kind of remote theoretical possibility that in fact he had never witnessed. In any

event, the evidential burden on the claimant is to prove matters on a balance of probabilities. This is at the very highest a concession about a remote possibility.

Provisional conclusion on Issue 1

68. Mindful of *Re A*, I provide what is at this point only a provisional conclusion. I find that the claimant has failed to prove on a balance of probabilities that when it was raining, soffits were cut inside near to Mr Briggs. I find that it is likely they were not. Therefore, my summary findings on these eight sub-issues are:

(1) In the builds that DHL engaged Mr Briggs on in the mid 1970s, there was carefully organised, rapid-pace, construction of low cost, social housing with much of the materials being prefabricated, which were then fitted together on plot.

(2) Soffits are an integral part of the boxwork design around the roof to make the property watertight.

(3) Soffits are fitted in the first exterior phase of construction; drylining takes place in the interior third phase.

(4) The soffit boards were not likely to be four feet wide. They were likely to be between 3 and 8 inches wide.

(5) The soffit boards only needed cutting to length. They were pre-cut to width with a degree of tolerance so they could rest on and overhang the frame/wall internally.

(6) The soffit-cutting took place on scaffold once measurement of necessary length was made.

(7) It was not practical to cut soffits inside alongside drylining. The rooms in the social housing residences were not large and drylining required the cutting and fitting of large plasterboards.

(8) It is unlikely that soffits would be cut indoors when it was raining.

69. Therefore, and overall on Issue 1, I strongly prefer the tested evidence of Mr Vine, supported in some measure by the tested evidence of Kenneth and John Parkes, to the untested evidence of Mr Briggs.

70. I emphasise that this is a provisional finding. I will reassess it in the context of the totality of the evidence, particularly about whether the soffits contained asbestos. If I find that they were likely to contain asbestos, that would materially support what Mr Briggs says about the indoor cutting when raining. I must therefore turn to that important second question.

F. <u>ISSUE 2</u>

(Soffits containing asbestos)

71. The evidence on this question comes from five principal sources:

(1) Joint position of experts;
(2) Mr Briggs's statement;
(3) First account given to Dr Mathew;
(4) Mr Vine;
(5) Mr Kenneth Parkes.

Five prime heads of evidence

On (1): Experts

72. The joint evidence of the experts sets a general context. Mr Chambers and Mr Stear have no personal knowledge of the materials used in the construction projects involving Mr Briggs and the defendant jointly. The experts both referred to the Health & Safety Executive's Asbestos Liaison Group (ALG) Memorandum 03/12 "Removal of asbestos soffits" (see Experts Proposition 5, previously). This is an authoritative prevalence review published in 2012. Whilst the experts agree this cannot be definitive, they agree that the *general* rates of use of asbestos boards were as follows: 40 per cent containing asbestos, 60 per cent wood-based materials, including plywood.

On (2): Mr Briggs

73. Mr Briggs was clear in his 2016 statement that the soffit boards he saw cut were asbestos. Mr Plaut makes the point that the comment was not in rebuttal of the defendant case, but proffered voluntarily. It was this knowledge that enabled Mr Briggs to connect his diagnosis on 29 June 2016 with the asbestos boards he had seen cut. On the engineering evidence, asbestos soffit boards were widely used at the time due to being cheap and durable when wet and thus the general evidence was consistent with Mr Briggs's evidence and provides support.

On (3): Mr Briggs's first account

74. Mr Plaut powerfully submits that support for the soffit boards being asbestos comes from Mr Briggs's first account. The evidence can be found at B510, a letter written by Dr Mathew, a consultant in respiratory medicine working for the Royal Wolverhampton NHS Trust, to Mr Briggs's GP in Cannock. The letter is dated 29 June 2016 and documents what happened at the clinic the previous day. The doctor reviewed Mr Briggs's case (Mrs Briggs was also present). Having examined the biopsy results, Dr Mathew confirmed to Mr Briggs the diagnosis of mesothelioma. Mr Briggs stated to Dr Mathew that he "might have been exposed to asbestos during [the] 70s while doing a plastering job". Thus, it is submitted on the claimant's behalf, that Mr Briggs was immediately able to connect the mesothelioma diagnosis with asbestos exposure while plastering.

75. The difficulty with this submission is that Mr Briggs does not mention the defendant company or his work there. It is clear in the statement he would shortly give to his solicitors on 20 August that year (B29) that he mentions exposure while working for the defendant. But he also mentions exposure while working for other employers. Moreover, between the report to Dr Mathew and the witness statement, Mr Briggs, completely understandably, submitted a claim form for IIDB (Industrial Injury Disablement Benefit). This was on 4 July 2016, so shortly after diagnosis (B362). There he mentions six employers over a period of 19 years (1960-79) where he was exposed to asbestos. Therefore, it cannot be said that the report to Dr Mathew necessarily is an exclusive reference to what happened in the defendant's employ. It

may or may not have been. Certainly, by early July he had identified other employers that had exposed him to asbestos. In Box 3 of the form, he provides details of exposure:

> "I was exposed to asbestos dust at work. I did commercial painting and decorating in buildings where it was highly likely there was asbestos + when on site as a plasterer, I remember people nearby cutting asbestos board for soffits. I was never warned of any danger or offered any protection."

76. Thus, his account does not provide any of the key details about the alleged exposure working for the defendant: that it occurred indoors, in the same room, while it was raining. Instead, he speaks about being "on site". Mr Rai's submission is that "nearby" could mean anywhere, and there is no explanation provided why it was that "asbestos board" (sic) for soffits were being cut "nearby". These points made against Mr Briggs would have undoubtedly been explored in cross-examination. But I pointed out to Mr Rai during closing submissions that it was not fair to the claimant to treat this document as a pleading. Mr Briggs was filling in a form for a benefit claim. That is not the same thing as a court statement or particulars of claim. Nevertheless, Mr Rai is right to point out that there is a lack of detail.

77. Then in the August witness statement, and for the first time, Mr Briggs specifically mentions the reason he was close to the soffit cutting – rain. I need to clear away one point that is in fact a non-point. In the particulars of claim, there is no mention of rain. However, it is not disputed that the August statement was filed along with the particulars, so it cannot be the case that rain was not part of Mr Briggs's case from the initiation of proceedings.

78. I judge that the Dr Mathew's letter does indicate that from an early stage Mr Briggs was connecting his exposure to asbestos with working onsite in constructions while he was plastering. I am prepared to accept in the claimant's favour that "plastering" includes drylining. However, his first account lacks the detail that the reason for the exposure was because soffit-cutting, habitually outdoor work, would happen inside due to the rain. That reduces the weight that can be placed on the first report. But it is a factor in his favour.

On (4): Mr Vine

79. Mr Vine said in his statement that "these [soffits] were, I am quite sure, during this period, made of timber" (B66, §12). When he testified, he repeated this evidence. He testified that the soffits were either plywood or timber. His specific mention of plywood was supported by the ALG report that was in the experts' joint summary. That supports Mr Vine's accuracy and credibility. He knows the difference between those materials and asbestos boards because he was a carpenter and joiner. Mr Plaut quite reasonably points out that Mr Briggs was also a carpenter and so he should know the difference too. However, I have provisionally found that Mr Briggs got the width of the soffit boards fundamentally wrong by a large factor. That affects his reliability (applying the *Arkhangelsky* principle). I have been vigilant to avoid the fallacy that such a finding on one point or issue is determinative of the lot (Charles J's "point A/point B). Equally, and overall, I have provisionally found that it was unlikely that boards were brought indoors to be cut when raining. Mr Vine said that he knew on the sites he ran that the soffits were plywood and timber "from experience". By that he meant that he saw the soffits himself on the sites he supervised where McLeans had contracted in DHL to dryline. Those soffits were only plywood or timber and from the mid-seventies he never saw any asbestos sheets in the contracts he was involved in. Mr Vine's evidence was strongly challenged. It withstood that. I have provisionally found that Mr Vine's tested evidence on

Issue 1 was far preferable to Mr Briggs's untested account. What Mr Vine says on Issue 2 is supported by the general prevalence noted by the experts. The prevalence report suggests that on balance it was likely that soffits were not made of asbestos, exactly as Mr Vine says. He, of course, was onsite viewing construction work "for up to 6 ½ days a week" (Vine). He saw the soffits being used at the constructions during his supervision of the sites.

80. There remains to the claimant the point that Mr Vine did not supervise all the sites Mr Briggs worked on for DHL. But I judge that the lack of credibility of Mr Brigg's evidence on other points, is relevant to and adversely affects his credibility on this (*Arkhangelsky* once more).

81. Overall, and on the issue of asbestos, I found Mr Vine's evidence to be persuasive and while considering the *Gestmin* memory limitations, find that his clear recollection does not suffer from them.

On (5): Mr K. Parkes

82. The claimant relies on §19 of Kenneth Parkes's statement (B59), that he cannot recall with certainty what the soffit boards were made of. However, one needs to read the rest of the passage to understand the context and consider his oral evidence. The entire sentence reads, "Whilst I cannot recollect it with certainty, I am sure the soffit boards were made of timber in any event and not asbestos". In evidence he said, "In the monthly meetings it was never discussed that asbestos was used, as it was never a problem."

83. I find that Mr Parkes's evidence provides scant support for the soffit boards containing asbestos, but points in the opposite direction.

Conclusion on Issue 2

84. The evidence of the experts indicates that it is certainly a general possibility that the soffits contained asbestos. Broadly, 40 per cent of them did. However, on a pure prevalence basis alone, it would be unlikely that the soffits contained asbestos.

85. Mr Vine is clear that as of the mid-1970s, asbestos was not used in the builds he was supervising. In particular, he states that the soffits that he personally saw when supervising sites DHL was drylining were plywood or timber, not asbestos. He was an eyewitness; he was there and saw what he saw. I found his evidence persuasive when combined with the prevalence evidence and the obvious good sense he made on Issue 1which bolstered his overall credibility. I strongly prefer Mr Vine's evidence to the untested evidence of Mr Briggs which in other respects has proved to be fallible.

86. However, Mr Vine did not supervise all the constructions where DHL engaged Mr Briggs. For the claimant's case to succeed given my strong preference for the evidence of Mr Vine over Mr Briggs, the claimant must prove that although for the constructions that Mr Vine supervised it was unlikely the soffits contained asbestos, it happens that in the other constructions they probably did. I find that implausible. I cannot reach that conclusion. That is because I do not accept Mr Briggs's evidence about the cutting inside (Issue 1) and I find it unlikely that asbestos was used in the constructions supervised by Mr Vine. Mr Briggs, of course, does not spell out in his 2016 statement which of the DHL constructions had asbestos soffits. There is in his statement on that an unhelpful lack of detail. Moreover, his evidence is not tested and cannot be clarified.

87. I remind myself that the claimant must prove on a balance of probabilities that asbestos was used in soffit boards that were cut near Mr Briggs. I find that the claimant has not proved this. Indeed, instead of it being probably true that the boards contained asbestos, I find, based on the totality of the evidence, that it is probably true that they did not.

88. I return to my provisional finding in respect of Issue 1 – I look at all of these things together. My conclusions on Issue 2 confirm and strengthen that provisional finding on Issue 1. Equally, as is clear from my analysis of the evidence, my provisional conclusions on Issue 1 have played a part in my findings on Issue 2. This is how recursive fact-finding works.

89. I want to emphasise that I reach no finding that Mr Briggs was inventing any of this or deliberately lying. I accept the defendant's interpretation of what happened, which was with the mesothelioma diagnosis, Mr Briggs tried to piece together what happened four decades previously and made mistakes. I cannot go as far as Mr Rai and find that Mr Briggs was "traumatised", and this must have affected his memory of events. This is psychologising without sufficient foundation. Instead, I see a clear application of the *Gestmin* principle of the distorting effect of civil litigation (see *Gestmin* especially at [19]-[21]). As time proceeded, from the initial account to Dr Mathew in June 2016 to the IIDB form in July to the witness statement in August, Mr Briggs expanded progressively on his explanation of the asbestos exposure, eventually alighting on the rain-induced indoor cutting of soffits as the method of his exposure. Trying to make sense of the past is an entirely natural and human process, but recollected memory, as *Gestmin* warns us, is not necessarily a faithful mirror of past events, but operates as a potentially inaccurate piecing together of it. Indeed, as Lord Pearce said in *Onassis* (again at 431)

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active."

I judge that this is what has happened here. Not deliberately or dishonestly, but fallibly. It must have been difficult for Mr Briggs to reach back four decades and distinguish what happened at different employers in the 1970s. There is some merit in the point Mr Rai makes that two of the employers - Dry Wall Interiors and Drylined Homes Ltd. - do sound very similar. The work Mr Briggs did for both was, he said himself, "the same type of work" (B34, §43) and he worked for them in close sequence. I find that Mr Briggs's recollection was demonstrably inaccurate in key respects. In Mr Briggs's statement, he says at §37 that he would "skim the boards". Yet his work was "dry" lining as opposed to wet plastering. Usually, there would be no skimming (although I envisage that conceivably it would be possible to wet plaster the dry boards, but I heard no evidence about that). I am less persuaded by Mr Rai's point that Mr Briggs is in error when speaking of "plastering" at §43. I am prepared to accept that a fair reading of that passage could encompass drylining which does use plasterboard. However, Mr Rai is right to point out that this is precisely the type of apparent inconsistency that would have been explored in cross-examination.

90. Equally, I find that Mr Briggs was plainly wrong about details such as the width of soffit boards and the cutting indoors, judged by the principles of improbability and contrasted with the defendant evidence. Equally, given these serious problems with the reliability of his recollection, I cannot place any or any meaningful weight on his further claim that the soffit boards contained asbestos. I far prefer the defendant's evidence on this. I do not accept the claimant's submission that the defendant evidence was dealing with "a general system of work" whereas Mr Briggs was dealing with "specifics – what happened to him". Mr Vine,

Kenneth Parkes, his brother John, where all there and saw what they saw. I found their evidence, overall and in combination, to be highly persuasive.

91. Nevertheless, and tragically, Brian Briggs was exposed to asbestos dust or fibre at some point in his working life. But the claimant has not proved on a balance of probabilities that it happened (or also happened) while working for DHL.

G. FINDINGS ON ISSUES 1 AND 2

92. I now directly answer the two factual questions posed of the court:

(1) Has the claimant proved on a balance of probabilities that when it was raining, carpenters came into buildings where Mr Briggs was working and cut soffit boards near him? **No**.

(2) Has the claimant proved that it is likely that the soffit boards being so cut contained asbestos? **No**.

93. Therefore, this claim does not pass through the factual gateway. The claim must fail.

H. DISPOSAL

94. I eschew the role of "mere umpire" – something more essential and fundamental is required. I perceive Lord Denning's comments about the search for truth to be far closer to the modern law's overriding objective, its ambition to deal with the case "justly" (CPR 1.1). I have used the axioms of fact-finding previously enunciated to search as best the court can with the limited materials before it for what happened in those house-builds that Mr Briggs worked on in the 1970s – the closest approximation to the forensic "truth" within the confines of the civil litigation process.[7] I ask myself the decisive questions: whether the claimant has proved to the requisite standard that the soffit-cutting at times moved indoors when it rained as Mr Briggs says, and that the boards being cut were asbestos. I find not.

95. However, standing back at the end of it, this case highlights starkly the intense fragility of life and our precarious place in it. In the 1970s, construction workers laboured on vast projects to give thousands of city dwellers a better life in more modern and sanitary housing. Undoubtedly, in a significant proportionate of these builds, and this is an inescapable part of our social history, asbestos was used. It was cheap, versatile and strong. It can also be lethal. Mr Briggs died after a terrible struggle with an asbestos-related cancer, mesothelioma, and at some point must have been exposed to asbestos dust or fibres. Other people in this case also have health concerns. Kenneth Parkes is living with Parkinson's Disease. Mrs Parkes is unfit

[7] Cf., for example, the overriding objective in the Criminal Procedure Rules 2020, r1.(2)(a), where "dealing with a criminal case justly" includes "acquitting the innocent and convicting the guilty". Substantive responsibility is important.

to give evidence and is terminally ill. Mr Chambers had to attend the trial remotely because of serious health issues of his own.

96. I appreciate that Mrs Briggs has endured so much with the tragic death of her husband and this outcome must be bitterly disappointing. A completely merciless cancer took him from her, when they could reasonably have expected to live together for a good decade or more. I fully understand that the dismissal of her claim will seem like another insult following Mr Briggs's death. However, this court cannot and must not judge these cases on sympathy. The truth does not change according to whom we feel most sympathy for. Our compassion might, but forensic fact is impervious to such winds. As Lady Hale said of fact-finding in *Re H* at [31]:

> "The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability."

97. We have heard a good deal about tools of trade in this case. The prime tool that the court uses is evidence. Evidence fairly, independently and dispassionately assessed, to reach findings of fact that faithfully reflect the "wide canvas" of the forensic materials laid before the court, no matter where they may lead. Here they lead decisively away from Mrs Briggs's claim. It must be dismissed.

98. That is my judgment.