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SOME SIGNIFICANT EVENTS IN UK ASBESTOS COMPENSATION 2004/5

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This talk covers four significant developments in UK asbestos compensation during the last 12 months.

1. **Pleural plaques test cases**
2. **T&N Bankruptcy/Administration**
3. **Cape proposed Scheme of Arrangement**
4. **Mesothelioma caused by contaminated clothing**

1. Pleural plaques

Summary: symptomless pleural plaques (PP) had been compensated in the UK for 20 years. In 2004 insurers brought test cases designed to change the law so that plaques were not actionable and/or to reduce awards of damages. They failed in that the High Court decided in February 2005 that PP were actionable, but it reduced damages significantly. Actionability and the level of awards will be considered by the Court of Appeal in November 2005 in an appeal by insurers.

2. T&N Chapter 11 Bankruptcy

Summary: this Chapter 11 Bankruptcy/Administration affecting asbestos victims in the UK and US began in October 2001. A provisional agreement was reached in September 2005 that will pay UK victims 24p in the £, and gives US victims a 50.1% share in the equity of the reorganized Group. The Administration in the UK has cost approximately £35m. The Bankruptcy costs in the US are significantly higher than this.

3. Mesothelioma caused by contaminated clothing

Summary: Of the 1800+ UK mesothelioma victims each year, 275 are women. A significant number of these women have not worked with asbestos. Their parents, husbands or other relatives have worked with asbestos and brought dust home on their clothes. There are situations

where a man dies of mesothelioma from work and his wife dies of mesothelioma from handling his clothes.

The date of knowledge for clothing exposure in English courts, in the absence of evidence about particular internal knowledge of a defendant, is now 1965, the year of the publication of the Newhouse and Thompson study in the British Journal of Industrial Medicine.

Argument had centred on the date at which employers should have taken steps to prevent their workers from carrying asbestos home on their clothes. A 1988 case, Gunn v Wallsend Slipway put the date at 1965. Margereson in 1995 was thought perhaps to have pushed the date back. The case of Maguire in the High Court in March 2004 established that the employer Harland and Wolff, a big shipbuilding and repairing company, was under a duty by 1961 to take such steps. That finding was reversed by a split decision of the Court of Appeal in January 2005. The Law Lords refused permission for a further appeal by Mr Maguire. The date at which a duty of care arises to family members exposed to contaminated work clothes is 1965, unless a defendant can be shown to have knowledge not in the public domain.

4. Cape plc Scheme of Arrangement

Summary: Cape plc, one of the biggest UK asbestos defendants over many years, had to settle a group action by its former South African workers in 2003, and had to reach a settlement contributing to UK Shipyard claims. It has a steady number of claims each year, growing in the case of mesothelioma, from its own former employees. As a result, Cape has proposed a Scheme of Arrangement under Section 425 of the Companies Act 1985. This is a legally binding compromise between a company and its creditors. Meeting(s) of creditors should vote on the Scheme, which has to be approved by a majority in number of at least three quarters in value of the creditors. The scheme then has to be sanctioned by the Court. None of this has happened yet, but Cape has indicated it will invest £7m to implement the Scheme and has written to former employees and interested parties with the proposals. This is an example of a big asbestos defendant, which is not insolvent, arguing that it might become insolvent if its asbestos claims burden increases or its trading position worsens, in order to invoke the protection of the Court.

1. PLEURAL PLAQUES TEST LITIGATION[1]

Summary: symptomless pleural plaques (PP) had been compensated in the UK for 20 years. In 2004 insurers brought test cases designed to change the law so that plaques were not actionable and/or to reduce

[1] Grieves and others v F.T. Everard and others [2005]EWHC 88(QB) 15th February 2005, Holland J.

awards of damages. They failed in that the High Court decided in February 2005 that PP were actionable, but it reduced damages significantly. Actionability and the level of awards will be considered by the Court of Appeal in November 2005 in an appeal by insurers.

The pleura consists of two layers of membrane covering each lung. The visceral pleura is next to the lung and the parietal pleura is outside, against the inner chest cavity. The two layers are separated by a thin layer of pleural fluid that acts as a lubricant for movement of the lung as you breathe.

Mesothelioma is most common in the pleura. It is thought there will be 2,500-3,000 cases of mesothelioma each year in the UK at some point between 2010 and 2020, after which the number will decline.

The other asbestos related pleural conditions are pleurisy sometimes accompanied by pleural effusion, diffuse pleural thickening, folded lung, and pleural plaques.

Pleural plaques (PP) are localised areas of pleural thickening with well defined edges, that usually develop on the parietal (outer) layer of the pleura or membrane lining the lung. Plaques are made of fibrous tissue that often calcifies as time passes.

It is not known with certainty how the asbestos fibres reach the outer layer of the pleura.

PP are the most common effect of asbestos inhalation. Less exposure is needed than for asbestosis. PP can be caused by occupational or environmental asbestos inhalation.

PP are dose related – the frequency and size of the plaques are a function of levels of asbestos exposure and its duration. On average, it can be assumed that a person with PP will have had higher asbestos exposure than someone without plaques.

PP rarely show on plain X rays less than 20 years after first exposure to asbestos.

PP are caused by an inflammatory response caused by scavenger cells or macrophages resulting in chemicals being liberated that cause fibrous tissue to be deposited on the pleura. Medical science does not answer the question of why plaques rather than effusions or diffuse thickening develop in some people and not in others. PP may increase in size with time, or become thicker.

It is thought that PP enlarge because of ongoing inflammatory response creating more fibrous tissue caused by both existing and new asbestos fibres that have made it as far as the pleura.

In the UK, until recently at least, PP have usually been found accidentally, when other lung or heart conditions were being investigated. PP rarely cause symptoms. Breathlessness in people with PP is thought to be caused by other conditions, perhaps very early asbestosis, or other reactions of the lung to asbestos inhalation. Breathlessness in plaques patients is often caused by non-asbestos related lung disease or heart disease. Breathlessness in PP patients is sometimes caused by anxiety/hyperventilation, or sudden self awareness, on being given the diagnosis. Very occasionally, extensive plaques can fuse together (become confluent) and contribute to or cause breathlessness through a restrictive effect.

Most people who are told they have PP experience some anxiety. Some people experience anxiety out of proportion to the diagnosis, and develop psychiatric illness.

It can be difficult or impossible to distinguish between PP and pleural thickening.

PP in themselves do not lead to any other asbestos related disease (ARD), and in themselves do not represent a risk of mesothelioma or any other condition. The risk of other ARD is a function of the asbestos exposure of which the PP are a marker, and not of the PP themselves.

The greater the amphibole asbestos exposure, and the younger a person was when suffering that exposure, the higher the risks of mesothelioma or lung cancer caused by asbestos. PP victims on average have had higher exposure to asbestos than those without plaques, so have higher risks of mesothelioma and other ARD. There is some support for the contention that patients with larger plaques have higher risks of mesothelioma than people with smaller plaques, which suggests that people with larger plaques have had more asbestos exposure.

Most people find it difficult to take on board the difference between PP in themselves not leading to or causing other ARD, and the asbestos exposure that caused the PP carrying a risk of other ARD. Many people with PP have seen workmates die of mesothelioma or asbestosis or lung cancer. They also know that such people had in many cases been diagnosed with PP before developing the terminal condition.

Some people suffer financial disadvantage as a result of being diagnosed with PP. It may be more difficult to obtain insurance. There may be discrimination by prospective employers.

In the UK, PP had been compensated by the courts since 1984. A trio of High Court cases against the Ministry of Defence, **Church, Sykes** and **Patterson**, had tested whether or not PP were actionable and therefore compensatable.[2] PP were found to be actionable in these three cases. The MOD did not appeal

[2] Church v Ministry of Defence, unreported, Peter Pain J 23 February 1984; Sykes v Ministry of Defence, unreported. Otton J 19 March 1984; Patterson v Ministry of Defence, unreported. Simon Brown J 29 July 1986.

these decisions. The awards were low (£1,250 to £1,500) and at that time few PP cases were being brought.

No reliable statistics are available on the number of plaques claims now brought in the UK. The defendants in this appeal estimated that about 75% by number and 50% by value of all asbestos claims settled in recent years have been PP. British Shipbuilders provided some statistics from their own claims record, but these were challenged and could not be extrapolated to the general workforce.

A diagnosis of PP sets time running against a person and he has 3 years in which to bring a court action. If he does not bring action within 3 years he will be time barred in respect of any later ARD he develops. Discretion is available to override time limits, but cannot be guaranteed.

In 2004, a group of 10 cases was assembled at the instigation of insurers and British Shipbuilders to test again the issue of whether or not PP should be compensated.

This was initially a smaller group of older men with low risks of further ARD/malignancy and with co-morbid conditions, who were not in work. Claimants' solicitors alerted to what was happening were able to add some other clients to the group, to make it a more representative cross section. Ironically, one of the cases chosen by the defendants was removed from the test group because, aged 81 with a 1-2% risk of developing asbestosis, he developed asbestosis. The cases fell into two groups, those against British Shipbuilders, and those against companies insured for the claims. The two groups had separate defendant representation. In one case chosen by the claimant team, insurers did not challenge actionability.

Three of the group had chosen "full and final" compensation, 7 had chosen provisional awards, preserving their right to return for further compensation if they developed a more serious ARD. The bracket for "full and final" awards before this case was put at £12,500 to £20,000 by the claimants. The bracket for "provisional" was put at £5,000-£7,000. Both brackets were significantly higher than damages in the original trio of MOD cases, which are now worth between £2,395 and £3,200.

The cases were heard in November and December 2004. Judgment was given on 15th February 2005.

The claimants put the case by conceding from the beginning that, although most medical textbooks treat PP as an "injury" or "disease", PP in themselves do not amount to damage sufficient to base a negligence action. However, PP cannot be considered in isolation, but in conjunction with:

- the risks of other ARD including mesothelioma and lung cancer, an assessment of which becomes possible once PP is diagnosed, and
- significant past and ongoing anxiety caused by the knowledge of having PP, which together made the condition actionable.

Mr Justice Holland formulated the claimants' definition of "damage" or "injury" in this context as:

"The permanent physical penetration of the chest by asbestos fibres to such extent as to give rise to:

a. the actual development of plaques;
b. the possible future onset of symptoms, even of a terminal condition; and
c. consequent, potentially continuing anxiety."

He then used this definition to formulate 3 issues, the answers to which would decide whether or not PP are actionable:

a. Can that permanent penetration with the implications necessarily flowing from such constitute "damage" or "injury" so as to complete the foundation for a claim in negligence?
b. If 'no', then does the position differ as and when the fact of penetration is confirmed by the finding of pleural plaques?
c. If 'no', then is it only with the onset of significant asbestos related symptoms that the foundation is provided?

After analysing 3 cases, **Cartledge v Jopling (1963) AC**, the Irish case **Fletcher v Commissioners of Public Works (2003) 1 I.R.**, and **Guidera v NEL, unreported, 17th November 1988,** the Judge decided that penetration of the lung by asbestos fibres is not in itself injury or damage founding a cause of action, and that damage to found a cause of action must be real, not minimal, and capable of being discovered – whether or not it is discovered is not relevant.

He found that there is real, greater than minimal, damage, when PP are diagnosed.

He agreed that PP in themselves are not actionable. But that, citing **Cartledge**, a cause of action "*accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done."*

Recognizing the circularity of this, he defined the basis for awarding compensation at the point at which PP are diagnosed, in this way:

1. The nature, extent and dating of the initial exposure to asbestos, with inferred ingestion.
2. A resultant penetration of the chest by asbestos fibres (now evidenced or capable of being evidenced by the fact of pleural plaques) that is permanent, i.e. such that has not been removed or neutralised by the natural defences of the body, and that remains for life as a possible catalyst for the onset of one or more symptomatic diseases.

3. Physiological change as encompassed by 2.
4. Risks as now assessable as to the future onset of symptomatic diseases; and
5. Present and prospective suffering or loss of amenity represented by anxiety engendered by the foregoing.

He concluded that exposure to asbestos and penetration of the chest by asbestos fibres when demonstrated by the existence of pleural plaques, added to quantifiable risks of future ARD, and present and future anxiety, together constituted actionable damage.

His findings included:

1. Anxiety caused by physiological damage can contribute to "damage" or "injury" to complete the basis for action. He distinguished anxiety in anticipation of physiological damage.

2. The presence of asbestos within the body that is permanent raising a possibility of asbestosis or mesothelioma cannot be treated as minimal. "Vivid from the trial is the impact of that possibility upon impressive, far from hysterical, claimants, notwithstanding consistent medical reassurance."

3. He felt bound by **Cartledge v Jopling**, which rejected onset of symptoms as the point at which a cause of action develops.

4. There was no scope in his decision for policy considerations about the "entry point" to the compensation system.

Compensation for PP on a provisional basis was reduced from the prevailing bracket of £5,000-£7,000 to £3,500-£4,000.

Compensation for PP on a "full and final" basis was reduced from what was put as a bracket of £12,500-£20,000 by the claimant team to full and final awards of £6,000 - £7,000, with an award of £10,000 for one claimant who had developed a psychiatric condition beyond general anxiety as a result of his PP diagnosis.

In the full and final awards, no awards were made for the future losses and expenses that might arise if the claimants developed symptomatic ARD in the future.

A practice had evolved prior to this case of calculating the full loss that would arise and discounting it to reflect the relatively low risks of symptomatic ARD. The Judge specifically rejected that approach.

He made it clear during the trial that in his opinion someone suing for PP ought to choose provisional damages, and asked whether the court had power to impose provisional damages. There was no power. In his view, full and final damages meant that the PP patient would be greatly under

compensated if he developed mesothelioma, at which point compensation would be most needed. It seemed to those of us involved in the case that the Judge set such a small differential between provisional at £3,500 - £4,000 and full and final at £6,000 - £7,000, so that no-one could be advised to choose full and final damages for plaques.

It was understood from the beginning that this High Court case was a springboard to a Court of Appeal decision. We will not know the Court of Appeal's decision by the time this talk is given.

British Shipbuilders did not appeal the judgment. The insurers did appeal the actionability issue and have the Court of Appeal's permission to appeal quantum as well. The claimants have permission to cross appeal on quantum.

The insurers contend that the Judge misapplied **Cartledge**. They accept that it decided that the accrual of a cause of action did not require the plaintiff to know about his condition, but that the condition must reach a threshold beyond minimal in order to constitute an injury and result in an award of damages. In Cartledge, the inhaled silica reduced the lung's elasticity and efficiency and capacity to cope with exertion or illness. It could cause symptoms before the surplus capacity of the lungs was used up and meant there was increased risk of tuberculosis. **Cartledge** means that it is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him, and may never be, tells in favour of the damage being minimal… *"Evidence that in unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial."* The Judge correctly understood **Cartledge** to say that a cause of action arose when the pneumoconiosis would have been visible on x ray had there been an x ray, not the later date when he was x rayed, but according to the insurers in their appeal, did not appreciate that without the potential consequences of unusual exertion or illness, the Court in **Cartledge** would have regarded the situation at the time that pneumoconiosis would first have been visible on x ray as one of minimal damage, not giving rise to an award of damages. PP are distinguished from pneumoconiosis, because there are no symptoms and no potential for symptoms, and so **Cartledge** should be distinguished.

In their appeal, the insurers took issue with the notion that permanent penetration of the chest by asbestos fibres is physiological damage in any sense.

The insurers cite Australian and U.S. Authorities[3] in support of the contention that no cause of action arises unless functional impairment or symptoms arise. The Australian case of **Torrens**, in which PP were found not to be actionable, was decided in the Dust Diseases Tribunal of New

[3] Torrens v James Hardie (1990) 6 NSWCCR 89 Dust Diseases No 10 of 1989. Hawaii Federal Asbestos Cases 734 F Supp, 1563 (1990) District Court. Norfolk & Western Rly v Ayers 538 US (2003). Metro-North Commuter R. Co v Buckley 521 US 424 (1997).

South Wales. In that Tribunal, proceedings can be brought for dust related diseases at any time, its rules expressly stating that no statutory time limits apply.

Against these submissions, the claimants (respondents to the appeal) submit that:

It was for the judge to decide on the evidence what constituted a disease or injury sufficient to complete a cause of action. "Personal injuries" are defined in Section 38(1) of the Limitation Act 1980 to "include any disease or any impairment of a person's physical or mental condition." PP are permanent, not reversible, can grow, may (rarely) cause breathlessness, have been treated by medical text books as being an injury or disease, and neither injury nor disease needs to be symptomatic.

Cartledge means that if there are no symptoms the condition may be minimal but there may still be disease. Asymptomatic thickening, asbestosis and pneumoconiosis are treated as a disease or injury.

Approaches to PP have varied between States in the U.S. The American litigation culture and public policy considerations are different from those in the UK. In other US cases it has been held that damages for emotional distress and cancer fear can be awarded if there has been some physical impact or injury as a result of asbestos exposure. Emotional distress has been compensated as a parasitic head of damage where there has been physical injury, and a "zone of danger" test has been applied. The claimants (respondents to the appeal) cite US cases in which asymptomatic asbestos pleural disease has constituted sufficient evidence of injury, or where asymptomatic pleural thickening has started time running, in the context of later symptomatic disease.[4]

Policy issues are likely to be emphasized by the insurers in their appeal. In terms of individual fairness they say that a PP patient cannot be distinguished in terms of anxiety and risks from anyone who has worked with or been exposed to asbestos. It is said that it places an unnecessary burden on a person diagnosed with PP to have to sue his employers within 3 years of that knowledge, or risk being out of time for any subsequent ARD he develops. It is said that if it can be inferred from the judgment that a cause of action accrues when PP would have been capable of being diagnosed, then a new limitation defence is available to a defendant when he later sues for a symptomatic condition such as asbestosis or diffuse pleural thickening.

It is said that advertising and free scans or x rays offered by claims handlers and some lawyers causes anxiety, and that people whose diagnoses of PP are reached in this way would be better off not knowing. It is said that the process of seeing lawyers and doctors about a possible PP

[4] Re Cuyahoga County Asbestos Cases 127 Ohio APP.3d358. Joyce v AC & S Inc 785 S21200

claim is itself a significant cause of anxiety, and that it is unrealistic to assume the cause of the anxiety is necessarily the diagnosis of PP.

The insurers will bring to the Court of Appeal's attention some of the least attractive features of the US asbestos compensation environment: the many Chapter 11 bankruptcies, and the inequities of those situations. The warning being that we face the same situation in the UK unless the threshold for entry into the compensation system is raised to exclude currently symptomless conditions.

Against this, the victims' lawyers say that policy is not relevant to the issue the court had to decide, namely whether PP are actionable injury, more than minimal.

If policy has to come into it, then the diagnosis of PP is a reasonable control mechanism for entry to the compensation system. The claimants cannot be blamed for the activities of claims management companies, the answer to which is regulation by government. None of the clients in this group had been scanned by claims companies. Scanning has its benefits in early detection of malignancy, dismissing fears if scans show no disease, and in channelling the patient towards responsible medical advice if the scan shows PP or other ARD.

It is said that to change policy on PP compensation after 20 years of compensating the condition would undermine the compensation system generally.

If symptomless PP become non-compensatable, there will be disputes in many more cases about causes of breathlessness or pain, the differential diagnosis between PP and thickening, and a tendency to characterise anxiety in terms of compensatable psychiatric illness.

The outcome is uncertain. My guess is that, whatever the reasons given for the judgment, it will be decided on the basis of policy about asbestos compensation. It may be that Holland J's decision has done enough by reducing the overall bill significantly to prevent the Court of Appeal feeling obliged to intervene on the issue of actionability. It is significant that British Shipbuilders has not appealed, and that it may have achieved its aim by reducing the bill. It may be that the insurers will be able to paint such a bleak picture of the U.S. experience that the Court of Appeal will remove actionability.

2. T&N CHAPTER 11 BANKUPTCY/ADMINISTRATION

***Summary**: this Chapter 11 Bankruptcy/Administration affecting asbestos victims in the UK and US began in October 2001. A provisional agreement was reached in September 2005 that will pay UK victims 24p in the £, and gives US victims at least a 50.1% share in the equity of the reorganized Group. The Administration in the UK*

has cost approximately £35m. The Bankrupcty costs in the US are significantly higher than this.

Another speaker, James Gleave from Kroll, has spent the last 4 years working full time on this, and will talk about it with more authority and in more detail.

My observations result from having being a Creditors Committee member from the filing on 1 October 2001 until recently. This Bankruptcy created an enormously complex situation involving competing interests and financial expertise. We, as volunteers on the creditors committee representing the interests of the UK asbestos victims, often felt out of our depth. We lacked the time and specialised knowledge as personal injury lawyers to understand the process to the same degree as the Administrators and their team of lawyers, the professionals retained by the various US Committees, or the US asbestos lawyers, steeped in Chapter 11 experience.

Federal Mogul (FM) was incorporated in Michigan in 1899. In 2001 it had 50,000 employees, of whom 27,000 were employed outside the US, mostly in Europe. It was the sole provider of one or more critical components of most cars made in the USA. In November 1997 it acquired the UK Group T&N Ltd.

Turner & Newall (later T&N) began in 1920 by the amalgamation of Turners Asbestos Cement, Washington Chemical Company, JW Roberts, and Newalls Insulation Company. The Group bought mines in Canada and South Africa, which it operated through local subsidiaries. It acquired or set up other UK subsidiaries, and Keasby & Mattison in the US.

On 1 October 2001, 133 out of 185 companies of the Federal Mogul (FM) UK Group of Companies went into simultaneous Administration in the UK and Chapter 11 Bankruptcy in Delaware, USA. The effect of this was to stay all asbestos disease claims against the Group. The aim was to restructure the business and ensure its survival.

The Group stated that it filed for Chapter 11 protection because in the USA those FM Group members with most of the asbestos liabilities, mainly T&N, Ferodo America Inc, Gasket Holdings Inc, and Felt Products Manufacturing Co., were defendants in 300,000 pending asbestos related claims as of June 2001. FMC, the parent company, was defendant in some of the actions. The FM Group had become more exposed to US litigation as a result of other Chapter 11 Bankruptcies. FM estimated its asbestos liabilities at $1.6 billion, of which $350 million would have been payable within 12 months. It estimated that $900m was not covered by insurance. In contrast, the UK asbestos disease claims had been manageable. There were only 650 UK claims pending at the time the Group filed for Bankruptcy. The UK claims would have remained manageable for the foreseeable future. On the other hand, it is said to be

FMC's acquisition of the UK T&N Group in 1997 that exposed FMC to many of the US claims.

It looks as though the end may be in sight after 4 years wait for T&N asbestos victims.

The Administrators' costs for the period 1 October 2001 to 31 March 2005 total just over £19m. There is an additional contribution of £5.5m to the U.S. Chapter 11 costs. In addition, legal costs incurred in the Administration in the UK were estimated at £11m in April 2005, some of which would be recoverable from defendants in litigation. Nearing the end of a very complicated history, the UK Administration and legal costs are about £35m, and the UK asbestos victims' recovery is about £33m.

As at 31st December 2001 there were 656 pending claims by UK Claimants. Dr. Peterson, an expert employed in the Chapter 11 proceedings, estimated the future number of UK claims at 21,125. A substantial proportion of UK Claimants suffered from serious asbestos disease. Of the pending claims, more than half involved mesothelioma, lung cancer or asbestosis. Dr. Peterson's forecast assumed this trend will continue into the future, with over 5,000 individuals contracting mesothelioma and over 5,000 contracting asbestosis.

Those of us on the creditors' committee did not appreciate for a long time the importance and potential adverse results for UK asbestos victims of the 50.1/49.9% split of the shares in the proposed reorganized company between the 524(g) Trust for present and future asbestos personal injury claimants, and the note holders or commercial creditors of FMC.

The essence of the Plan of Reorganization was this early agreement between the US Commercial Committee and the US Asbestos Committee, which became known as the "central deal".

We were advised in the spring of 2004 by the Administrators that this was essentially unfair. Share capital of the reorganized FMC would be split 50.1% /49.9% between the Asbestos Trust and the Note holders, owed approximately $2.2 billion under a series of loan notes issued by FMC. This represented a dividend of 41-52% to the Note holders and 7.2% to the asbestos claimants. However, in a liquidation of the T&N companies (accepting for the sake of argument the low realisation values and the estimated asbestos claims put forward by the Plan Proponents), the unsecured creditors (who included the asbestos claimants) would receive a dividend of 3-4%, but in a liquidation of FMC the Note holders would receive nothing, because secured creditors' claims would exhaust the realisations.

We did not appreciate that the conversion of claims into equity in the reorganized company meant that no-one would receive any compensation for several years.

We had very little idea throughout of the eventual dividend that asbestos victims would receive.

We did not know that the eventual Trust Distribution Plan (TDP) would, in our eyes, clearly favour the US creditors.

We didn't understand the constant delays in the process or how it could cost so much.

By spring of 2004 the Administrators had told us they could not be satisfied that the Plan meant a better result for creditors than a controlled realisation of the business and assets of each company, or that the Plan treated all creditors fairly.

This meant, as some of us saw it, that the previous 3 years of work and negotiations towards a consensual restructuring, the Chapter 11 Plan of Reorganization (the Plan), and the Schemes of Arrangement or Company Voluntary Arrangements (CVAs) in the UK, had been a complete waste of time and money.

The unfairness of the Plan towards UK Claimants resulted from:

(1) The Central Deal between the Note holders and US Asbestos Claimants Representatives.

(2) The massive uncertainty regarding the value of the stock which would be transferred to the Trust for asbestos claimants.

(3) The valuation of US asbestos claims against T&N.

(4) The terms of the TDP.

The Plan Proponents (Federal Mogul, 3 US Committees, the US Future Claimants' Representative, and the pre-Petition Lenders) had obtained US Court approval in May 2004 of the Disclosure Statement describing the Plan. The US Court had ordered the solicitation process involving posting the Plan and Disclosure Statement to all known creditors by 12 July 2004, votes on and objections to the Plan by November 2004. All of this was done. A majority of votes approved the Plan.

A confirmation hearing at which the Plan would be approved if necessary majorities of creditors had voted in favour was to be held by December 2004.

In May 2004 the Administrators applied to the Court in London for guidance on whether they had to promote the Plan. That was adjourned until 16 July 2004, by which time it had been agreed by the Plan Proponents that they could not force the Administrators to promote a solution they did not recommend, so an order was made by consent that

the Administrators could add to their functions that of effecting a more advantageous realisation of assets than would be achieved on a winding up.

By this time the Administrators had recommended that a controlled realisation of assets would deliver a better result for the asbestos victims than the Plan would.

We had very little information about the US asbestos claims. Dr. Peterson estimated that well over 90% of US claims both pending and future, were for claimants with non-malignant conditions, but gave no information on the proportion of those claimants with a benign condition with no functional effect. We suspected the vast majority of US claimants were unimpaired, perhaps lacking even a pleural plaques diagnosis, the so called "worried well", but we did not know.

The Plan Proponents had estimated at $11 billion the value of current and future asbestos claims against T&N. Conflicting advice obtained here from EMB put it at $5.6 billion. But even this did not take into account the potential for the court in the UK to reject vast numbers of US claims because they did not meet the level of proof on diagnosis or causation that is required here. We thought this would reduce the total value of claims significantly. Tillinghast, employed by the T&N Pension Scheme Trustees, put the bracket at $2.1 to $5.5 billion. Navigant, employed by another US committee, estimated it at $2.5 billion. In spite of this variance of estimates, the Plan Proponents made it known that they would try to force the Plan through the US court system.

Part of this involved asking the US Court to estimate the claim of the T&N Pension Fund for voting and distribution purposes, but the court decided in October 2004 that this was a UK issue.

On 21 October 2004 the Administrators obtained an Order from Mr Justice David Richards in the High Court in London:

(a) Not without further order to propose schemes or CVAs in the form attached to the Plan, and

(b) Not without further order to convene creditors meetings pursuant to any demands pursuant to the Plan – in other words, releasing the Administrators from any obligation to implement the Plan.

The Court also gave the Administrators permission to file objections to and oppose the implementation of the Plan, and to attend and be represented at the US court hearing scheduled to have the US court oversee bidding procedures for the sale of UK group assets. A further hearing was fixed for 10th November 2004. It was made clear that the Administrators, not the directors, were entitled to make decisions about the Plan.

The Administrators told the Plan Proponents that they would begin a controlled realisation of the UK group assets by 30 April 2005 unless the Plan Proponents were able by that time to reach agreements with the various UK creditor groups, which looked unlikely.

Meanwhile they continued negotiations with the Plan Proponents.

The Administrators always wanted a consensual solution, and foresaw great problems realising the UK group assets against the opposition of the US Plan Proponents.

The Plan Proponents had applied to have the US court oversee bidding procedures realising the UK group assets. This application was withdrawn late in October 2004, after the UK judgment of 21 October was communicated to Judge Lyons of the US Bankruptcy Court.

The Administrators filed objections to the Plan on 8 December 2004.

The first stage of the Confirmation of the Plan was an Estimation Hearing at which the US Judge would determine the value of present and future asbestos claims against the UK group of companies (the estimate of $11 billion that had been made at an earlier stage). That hearing took place in July 2005, the intention being that the Confirmation Hearing for the Plan would happen 1-2 months after judgment was given.

Behind the scenes, negotiations had been taking place in the context of the controlled realisation by the Administrators of T&N Group's UK assets having begun.

The Administrators then negotiated the sale of European loan notes owned by T&N to Deutsche Bank for 350m Euros.

This one development, as we understood it, led to a rapid agreement after 4 years of impasse. We understood this was because the Plan Proponents needed to retain the notes, in order to retain control of the companies, so the sale of the notes to Deutsche Bank had to be stopped.

The Administrators believed that a controlled realisation would produce a dividend for UK asbestos victims of 17.5p in the £. It was fraught with problems if carried out against the wishes of the Plan Proponents.

The agreement reached will bring a dividend of 24p in the £, and is consensual. This does not include insurance recoveries.

The agreement provides for cash reserves to be allocated to certain creditor groups to be distributed under CVAs. The money will come from funds held by the Administrators and from the sale of the European Loan Notes.

The reserves are:

1. T&N Pension Scheme, £193m;
2. UK asbestos claims, "Cape" claims[5], Australian PI claims[6] against T&N, £33m;[7]
3. Other general unsecured claims against T&N, £5.5m;
4. "Chester Street"[8] claims £22m;
5. Asbestos property damage claimants £5.5m;
6. Unsecured claims against companies other than T&N, a reserve of £115.97m apportioned between the companies, available for claims of general trade creditors, UK asbestos claimants, Cape claims, Australian asbestos PI claims, claims of T&N Pension Scheme under s 75 of the Pensions Act 1995, and (in relation to the reserve attributable to Federal Mogul Ignition UK) the claim of the Champion Pension Scheme.

A reserve is also to be set up to cover the Administrators' and their advisors' costs incurred after signing the agreement, and the agreement provides for a contribution of £5.5m towards the Chapter 11 costs.

Neither US nor Canadian asbestos personal injury claimants may claim against the reserves set up.

Inter company claims within the group cannot be made against these reserves.

The US asbestos claimants will obtain at least 50.1% of the equity in a reorganized FMC.

The UK claims will be administered by a UK based and controlled Trust.

The UK, Cape etc asbestos victims will have to prove their claims in accordance with a Trust Distribution Procedure to be established by the UK Asbestos Trust.

In summary, the UK asbestos victims will have access to:

(1) £33m reserve;

(2) Pro rata share of £115.97m reserve for claims against companies other than T&N;

(3) Any proceeds of the Hercules insurance policy[9] in which the UK Asbestos Trust shall have a 7.5% interest;

[5] Cape claims is shorthand for claims by people domiciled outside the UK which have been or could have been brought in the UK courts. See Lubbe/Afrika v Cape plc and Article 2 Brussels Convention.
[6] T&N licensed the limpet spraying process in Australia. These are claims by Australian residents which have been or could have been brought in the UK courts.
[7] The £33m includes legal costs. It also includes CRU repayments. CRU will receive 24p in the £ of recoverable benefits.
[8] Chester Street claims are contribution claims from shipyards and from individuals exposed to asbestos during their work for shipyards.

(4) The employers' liability settlement.[10]

This agreement is subject to conditions precedent, namely:

(1) clearance of the Pensions Regulator;
(2) US court approval;
(3) UK court approval (both by 14th November 2005).

We can only hope that everything is finalised and that we move towards paying victims under both the employers' liability and now the general trust distribution plans very quickly. We on the UK creditors' committee had been sufficiently depressed by projections of a 7% dividend that we came to regard 24% as good news. I have seen it estimated that the U.S. Chapter 11 costs were running at $75m a year. Add the £35m or so UK costs, and this has been one of the most costly episodes in the history of asbestos compensation.

3. MESOTHELIOMA AND CLOTHING EXPOSURE

***Summary*: Of the 1800+ UK mesothelioma victims each year, 275 are women. A significant number of these women have not worked with asbestos. Their parents, husbands or other relatives have worked with asbestos and brought dust home on their clothes. There are situations where a man dies of mesothelioma from work and his wife dies of mesothelioma from handling his clothes.**

The date of knowledge for clothing exposure in English courts, in the absence of evidence about knowledge of a defendant that is not in the public domain, is now 1965, the year of the publication of the Newhouse and Thompson study in the British Journal of Industrial Medicine.

Argument had centred on the date at which employers should have taken steps to prevent their workers from carrying asbestos home on their clothes. A 1988 case, Gunn v Wallsend Slipway put the date at 1965. Margereson in 1995 was thought to have pushed the date back. The case of Maguire in the High Court in March 2004 established that the employer Harland and Wolff, a big shipbuilding and repairing company, was under a duty by 1961 to take such steps. That finding was reversed

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[9] This is a £500m insurance policy taken out by T&N in 1996, but only activated when the aggregate cost of claims made or brought after 1 July 1996 exceeded £690m. The policy was taken out by T&N with a captive insurer, Curzon, which re-insured with European International Reinsurance Ltd (EIRC), Munich Re, and Centre Re. Litigation involving the Administrators and the Re insurers has taken place. Confidential settlement was reached with EIRC in early 2004.

[10] Settlement was reached between the Administrators and T&N's UK employers' liability insurers R&SA and syndicates at Lloyds in May 2004. The action was settled for £36m, but this is only available to T&N workers exposed to asbestos between 1 October 1969 and 30 April 1995. They are a minority of UK asbestos disease victims. Approval of the Court is required.

by a split decision of the Court of Appeal in January 2005. The Law Lords refused permission for a further appeal by Mr Maguire.

More than 90% of mesotheliomas are caused by asbestos.

Women have developed mesothelioma as a result of washing their husbands' or parents' contaminated work clothes.

The risk of developing mesothelioma depends on the dose of asbestos breathed in over a lifetime. The risk increases with the dose. A thermal insulation engineer or lagger will have had the heaviest type of exposure to all 3 main types of asbestos, blue, brown and white. He has a 1 in 10 risk of developing mesothelioma. But a car mechanic, who blew out brake drums, has a very much lower risk of developing mesothelioma. Handling clothes contaminated by asbestos dust involves intermittent moderate and sometimes heavy exposure to airborne asbestos fibres, perhaps 30-100 fibres/ml.

The risk is higher the heavier your exposure has been to blue or brown asbestos, but all asbestos is dangerous.

To have caused the disease, the asbestos dust must have been breathed in at least 10 years before symptoms develop. There is no upper limit. Dust may have been inhaled as long as 50 or 60 years ago before mesothelioma develops. The average period between first exposure to asbestos and developing the disease is 30-40 years.

Most people who develop mesothelioma do not have asbestosis. Mesothelioma is not caused by cigarette smoking.

At the moment, there are 1,800 cases of mesothelioma a year. 275 of these are women. Experience suggests that a significant number of these are women whose only exposure to asbestos has been from the clothing of relatives who worked with the substance. There are no statistics on this.

People who die of mesothelioma usually die from complications of the disease in the place it originated, usually the chest, and not from its spread to other parts of the body. The fluid that begins in the pleura is eventually replaced by solid tumour that can cause difficulty breathing, pneumonia or heart problems, as well as pain.

It is accepted that employers at some point developed a duty of care to families of their workforce in this context. The argument has been about when that duty of care began.

The date at which a duty arose was arguably 1960. A paper on *Mesothelioma and Asbestos Exposure* by Dr JC Wagner was published in the British Journal

of Industrial Medicine.[11] It was arguably 1964 when Wagner's findings were published at a New York conference. It was arguably 1965, when Muriel Newhouse's study on mesothelioma amongst the families of asbestos workers appeared in the British Journal of Industrial Medicine.

Wagner's 1960 paper recorded mesothelioma in 32 cases investigated at Kimberley, South Africa, where there was probable exposure to blue asbestos in the Northern Cape. In 28 of these cases there was some association with the areas in which crocidolite was mined, stretching in a band from Prieska north to Kuruman.

In 25 of the cases there was only "circumstantial" evidence of asbestos exposure. It might be inferred from these statistics that modest environmental or work exposure could cause mesothelioma.

In the context of a trial about date of knowledge of risks of mesothelioma from contaminating clothes, in order to establish 1960 as the correct date, it would probably be necessary for the judge to find that this paper by Wagner effectively warned UK industry of the risk of mesothelioma from slight environmental exposure.

There is some support that this is what the paper meant in correspondence by Drs. Wagner and Smither to the British Medical Journal in 1962[12], which refers to the exposure to asbestos dust having been minimal in a number of mesothelioma cases.

In the South African Medical Journal of 1961 [13] an article by Sleggs, Marchand and Wagner commented that in some of the South African mesothelioma cases the exposure had been of such a transitory nature that it was rapidly forgotten, which lends further support to that interpretation.

Dr Muriel Newhouse studied reported cases of mesothelioma in East London and found many whose only known exposure resulted from sharing a house with an asbestos worker and some others who had no occupational or domestic exposure but had lived close to an asbestos factory.[14]

Dr Newhouse's findings were put high in the public consciousness by the *Sunday Times* on 31st October 1965 in an article headed *"Scientists track down killer disease":*

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[11] *Diffuse Pleural mesothelioma and asbestos exposure in the North Western Cape Province* JC Wagner C A Sleggs and Paul Marchand British Journal of Industrial Medicine 1960, 17, 260.

[12] British Medical Journal, Vol 2, 1962

[13] South African Medical Journal, January 1961

[14] *Mesothelioma of pleura and peritoneum following exposure to asbestos in the London area* by Muriel L Newhouse and Hilda Thompson. British Journal of industrial Medicine 1965, 22, 261.

> *"A disquieting "new" occupational disease capable of killing not only the exposed workman but also perhaps his womenfolk and even people living near his place of work is the subject of intensive behind the scenes activity by a British scientist … A remarkable report … has brought this whole matter to the surface."*

Mesothelioma victims now being diagnosed were frequently exposed in the 1950s and early 1960s. Insurers have maintained that this exposure, if less than substantial, happened before they could have known of any risk, and therefore defendants are not liable in negligence.

In employee cases this does not present a difficulty, because employers were often in breach of regulations introduced as long ago as 1931, and effective from 1933. Breach of statutory duty cannot be alleged in domestic exposure cases.

Gunn v Wallsend 1988[15]: Mr Gunn brought an action for the death of his wife from mesothelioma. She had contracted the disease from washing his work clothes between 1948 and 1965. He worked in a shipyard. Lagging work was done during 1 or 2 weeks out of 7 or 8 weeks. He used compressed air pipes to blow dust off his clothing.

Approximately once every two weeks he came home with clothes white with dust. He undressed outside and shook his work clothes, and his wife washed them. Samples of lung tissue showed 93,000 asbestos fibres per gram. The Judge found that mesothelioma was caused by exposure to asbestos dust on Mr Gunn's work clothes but that there was no duty of care to Mrs Gunn unless Wallsend Slipway should have foreseen there was a risk of some physical injury to her as a result of the exposure.

He decided that the known hazard prior to the Newhouse Paper in 1965 was asbestosis caused by heavy and prolonged exposure. He found that the link between exposure and mesothelioma was not firmly established until the publication of Wagner's Paper in 1960 which indicated that exposure of the victims who had lived or played in the vicinity of asbestos mines and mills was heavy.

There were no regulations to put an employer on notice of the risk from medium or light intermittent exposure.

The official maximum permissible concentration up to 1960 was 177 particles per cubic metre of air.

There was no published literature warning of the risk to families of asbestos workers until the Newhouse paper of October 1965. There was no evidence

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[15] *Gunn v Wallsend Slipway & Engineering Company Ltd* Times. 23.1.1989

that any other shipbuilding employers or industry generally foresaw risk of injury to workers' families from dust brought home on clothes.

Mr. Gunn lost his case.

Margereson/Hancock v J W Roberts, 1995.[16] J.W. Roberts, a subsidiary of T&N Ltd operated an asbestos factory in a heavily built up suburb of Leeds until 1958. Arthur Margereson had played on the loading bay of the factory and in the streets around it between the ages of 8 and 14 years i.e. from 1933 until 1939. He died from mesothelioma in 1991. June Hancock had similar exposure as a child. She was still alive at the time of the trial.

Roberts manufactured asbestos mattresses for steam engines, used to insulate boilers, and patented the limpet sprayed asbestos process, used widely on ships and buildings. Sacks of asbestos were stacked in the loading bay, to which children had access and played on them.

Mr Justice Holland, who later tried the plaques test cases, decided there was a duty of care to residents outside the factory. He also found that in the immediate vicinity of the factory conditions were no different than from inside the factory. Roberts were found liable to Mr. Margereson and June Hancock.

They appealed. The Court of Appeal held that asbestos dust was left outside the factory in large amounts and that bales of asbestos dust were stored on loading bays where children played on them. Roberts lost the appeal.

Merewether in *"Effects of asbestos dust on the lungs and dust suppression in the asbestos industry"* 1930[17] stated:

> *"the most important local effects which may follow the inhalation of dust included pulmonary and bronchial catarrh, asthma, bronchitis, fibrosis of the lungs and secondary changes such as emphysema local or diffuse and ... fibrosis of the lungs… This is recognised to be the most important lesion caused by the inhalation of dust and the proneness of workers with a dust fibrosis to be affected with pulmonary tuberculosis has been shown to be the main cause of increased mortality rate from the latter disease."*

Merewether further wrote that the emission of a visible dust cloud in factory workrooms is a clear indication of the inadequacy of protective measures.

This was reflected in the 1931 Regulations, effective from 1933, which prohibited significant exposure to visible asbestos.

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[16] *Margereson and Hancock v J W Roberts Ltd*. PIQR 1996 5

[17] Merewether and Price "*Effects of Asbestos Dust on the Lungs and Dust suppression in the asbestos industry"* HMSO1930

The Court of Appeal cited pre 1931 publications to the effect that asbestos dust was injurious

Czarnikow v Koufos 1969 [18] (Lord Upjohn) established that a defendant is liable for any damage which he can reasonably foresee may happen as a result of the breach, however unlikely it may be, unless it can be brushed aside as far-fetched.

Page v Smith [19] followed this proposition. Two cars collided at about 30 mph. One driver developed nervous shock. Although the risk of nervous shock was remote and it would only develop in very exceptional circumstances, the risk was not "a mere possibility which would never occur to the mind of a reasonable man".

CSR v Young. Court of Appeal, New South Wales[20]

Vivienne Olsen was born at Wittenoom, Western Australia, in September 1959 and lived in the town until the family left at the end of 1961.

She was exposed to blue asbestos from asbestos waste or tailings which were used to build roads and as fill-in or ground cover around the school and many houses. Her parents' back yard and surroundings were spread with tailings that were about 2% asbestos fibre content.

Her father worked as a draughtsman at the offices at Wittenoom Gorge. He came home with asbestos fibres on his clothes.

There was a blue/grey haze over the town from the dust containing asbestos fibre. She inhaled fibres/dust from her father's clothes and from the environment. She crawled and began to walk her exposure increased. Her exposure included exposure from tailings in the back yard and elsewhere in the town.

In April 1994 she was diagnosed with mesothelioma aged 34. She had no other asbestos exposure. She died in January 1995.

The issue was whether it was foreseeable by the end of 1961 that she could be injured from asbestos dust in the town.

The majority finding, Giles J.A.: As a baby Vivien inhaled asbestos fibre from her father's clothes. The issue was whether injury was foreseeable.

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[18] *Czarnikow v Koufos* 1966 2 WLR p1397

[19] *Page v Smith* Weekly Law Reports 26.5.1995 p 644

[20] *CSRLtd and another v Young* Court of Appeal NSW 25.2.1998. Thanks to Armando Gardiman of Turner Freeman for the transcript of his case.

He cited **Wyong v Shirt**[21], to the effect that a risk which is unlikely may nevertheless be foreseeable provided it is not far-fetched or fanciful. Before 1959 blue asbestos was known to be dangerous and to cause asbestosis and cancer which were thought to be dose related.

The **Dreesen standard** [22] was regarded by Dreesen himself not as a safe limit but a threshold until better data was available. No safe dosage had been identified in the period 1959 to 1961. He referred to the 1931 Merewether Report having mentioned asbestosis in by-standers such as clerical workers in asbestos plants.

He referred to Dr. MacNulty having said in 1959 that, *"It was unfortunate that people who worked in the mine and mill were exposed to dust at work and then should have to face it at home and recreation."*

He concluded that even if the literature had not definitely established that "external" exposure caused asbestosis or carcinoma, the risk from exposure of the kind in Wittenoom, with the nature and extent of the use of tailings (to which may be added the asbestos fibres borne on clothes) was foreseeable. He noted Dr MacNulty, had developed "*a growing conviction that the introduction of tailings to the town in fact brought the mine to the town instead of the other way around"*.

By a majority of 2:1 judgment was given in the Plaintiff's favour.

Dissenting judgment, Handley J. A.: The risk of contracting mesothelioma from exposure to asbestos dust was barely hinted at before the Wagner article in 1960.

In August 1960 Wagner and others wrote in the British Journal of Industrial Medicine on diffuse mesothelioma and asbestos exposure in the North Western Cape Province. It could be inferred that modest environmental or employment exposure could produce mesothelioma.

The first report in Australian literature was by Dr MacNulty in the Medical Journal of Australia December 1962 on a patient from Wittenoom who had heavy exposure, gross asbestosis and also mesothelioma.

The Plaintiff's case was that the company should have warned their employees some time before December 1961 that they and their children ran a risk of contracting mesothelioma and the plaintiff's mother said she would have acted on such warning and left the town with her children without delay. It was well known in the mine and mill that there was a risk of asbestosis.

[21] Wyong v Shirt 1980 146 CLR 40

[22] Dreeson *A study of asbestosis in the asbestos textile industry* 1938 United States Public Health Service

On 18th September 1961 Dr MacNulty wrote to Dr Renny, a specialist physician in Sydney with links with the CSR:

> *"even in the township much of the road material and surfacing is made of waste material from the mines and blue asbestos fibres are obvious. On reading Wagner in the BJIM one is left with the suspicion that minimal asbestos exposure may be dangerous".*

This was written only two and a half months before Vivienne Olsen left Wittenoom. The judge noted that he never recommended that the mine or mill be closed or that people leave the town.

He concluded that it could not have been known to the company by the end of 1961 that there were risks from purely environmental exposure.

The recommendation in Dreesen that asbestos dust should be kept below 5 million particles per cubic foot was the accepted standard at the time. There were no other cases of people developing an asbestos related disease purely from living in the town. Dust levels did not exceed the Dreesen standard to create a foreseeable risk of injury from asbestosis.

The exposure in **Margereson** was similar to factory levels, so that **Margereson** should be distinguished**.**

He referred to the judge's finding in **Margereson** of the general hazards of exposure referred to in the Merewether report including pulmonary and bronchial catarrh, asthma, bronchitis, fibrosis and emphysema and increased susceptibly to childhood asthma and noted that the Court of Appeal in England endorsed the trial judge's decision that the defendants should have foreseen risk of some pulmonary injury, not necessarily mesothelioma. But Handley JA said the decision was of no assistance where environmental exposure did not approximate industrial exposure.

Maguire v Harland & Wolff

Maguire v Harland & Wolff plc
The Hon Mr Justice Morland
24th March 2004. [2004] EWHC 577 (Q.B.)

Mrs Teresa Maguire, aged 67 at the time of trial and too ill to attend the trial, was diagnosed with mesothelioma in 2000. She married her husband in December 1961. During that time and until 1965 Mr Maguire worked as a boilermaker at Harland & Wolff's shipyard where he was exposed to asbestos dust. Harland & Wolff accepted that they were in breach of duty to him in exposing him to the risks attendant to the inhalation of asbestos dust.

Teresa Maguire sued Harland & Wolff, alleging that they owed her a duty to take reasonable care not to expose her to the risk of injury to her health consequent upon her exposure to asbestos dust brought home each working day by her husband, and were in breach of that duty.

They denied that they owed Mrs Maguire any such duty because, they asserted, it was not foreseeable that Mrs Maguire was at risk having regard to the amount and frequency of her exposure to asbestos dust and the state of actual or imputed knowledge of the risk in the period 1961-1965.

At the end of a trial lasting one day, conducted entirely on the paper evidence, Morland J. found in favour of Mrs. Maguire, that defendants were liable for clothing exposure in the years 1961-1965.

I quote below some parts of the judgment that explain Morland J's decision.:

"I do not accept that Harland & Wolff in the period 1961-1965 needed prophetic vision to foresee that their employees' wives, in the typical position of Mrs Maguire, would be exposed to considerable quantities of asbestos dust each working day when their husbands returned from work or that such wives would be exposed to substantial quantities of asbestos dust when brushing down, shaking and washing their husband's clothes with the attendant risks of serious injury to health which were well-known by that time even if substantially ignored by shipbuilders such as Harland & Wolff who undoubtedly took no effective steps whatever to protect Mr Maguire from the risk."…

Mr Feeny (defendant's counsel) particularly relied upon the Factory Inspectorate document ***"Toxic Substances in Factory Atmospheres"*** *published in March 1960 – where it is stated: -*

> *"**Permissible concentrations***
>
> *While systems of control should be as effective as it is practicable to make them, it is desirable to have some guide to which the efficiency of the control measures can be related. In the List at the end of this booklet there are set out figures of maximum permissible concentrations of certain substances used in industry. For each substance a figure of concentration in atmosphere is given. If this concentration is exceeded, further action is necessary to achieve satisfactory working conditions. The List also serves as a general indication of the relative degrees of toxicity of these substances."*

Having said that "the figures relate to average concentrations for a normal working day", the list specifies asbestos at 177 particles per cubic centimetre of air, confusingly an American measure not readily comprehensible in England.

This was repeated in the 1968 Factory Inspectorate Pamphlet. However the Factory Inspectorate document before dealing with "permissible concentrations" stated: -

> *"Contaminated clothing should be changed and hands, face and any other exposed parts of the body should be thoroughly washed at the end of the working day."*

In my judgment this should have alerted a reasonably prudent employer to the risks of secondary exposure. There is no evidence that Harland & Wolff ever considered the risk*….*

Even if it could be argued that Harland & Wolff could not reasonably have foreseen that Mrs Maguire risked mesothelioma from her exposure to asbestos dust, ***it would not avail Harland & and Wolff if they should reasonably have foreseen some pulmonary injury****.*

As Russell L.J. said in Margereson's case: -

> *"We add only that in the context of this case we take the view that liability only attaches to these defendants if the evidence demonstrated that they should reasonably have foreseen a risk of some pulmonary injury, not necessarily mesothelioma."*

I accept the submissions of Mr Allan (claimant counsel) that by 1961 echoing the words of Buxton J. in the Owen [23] case, ***the difficulties related to and the threats posed by asbestos were sufficiently well-known and sufficiently uncertain in their extent and effect for employers to be under a duty to reduce exposure to the greatest extent possible*** *(see the judgments of Buxton J. in Owen's case at page 41, of Mr Machell Q.C. in Jeromson's [24] case at page 30 and of Hale L.J. also in Jeromson's case at page 275)….*

From at least the publication of the report of Merewether and Price in 1930 Harland & Wolff were or should have been aware of the risk of serious injury to health from inhalation of asbestos dust. Certainly by the late 1940's the incidence of lung cancer from exposure to asbestos dust was recognised….

In my judgment the risk of serious injury to Mrs Maguire's health was, and should have been by Harland & Wolff, reasonably foreseeable, indeed obvious, in the period 1961 to 1965. They took no steps to safeguard her from the risk, or indeed her husband….

The risk to her could have been reduced by simple and cheap precautions in the context of the cost of shipbuilding and ship repair contracts. Harland & Wolff could have provided changing rooms and showers at the exit to their yards where at the end of a working day a boilermaker could hand in his contaminated clothing for laundering by the company and then showered and changed into asbestos-free clothing before returning home."

Maguire v Harland & Wolff
Court of Appeal 26th January 2005

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[23] Owen v IMI Yorkshire Copper Tube, Buxton J. 15th June 1995

[24] Jeromson and Dawson v Shell Tankers, Mr R Machell QC, 1 February 2000, and CA 2001 PIQR 19

LJ Judge, LJ Mance, LJ Longmore
[2005] EWCA Civ 01

The Court of Appeal reversed Morland J's decision on 26th January 2005 by a 2:1 majority.

Permission to appeal to the Law Lords has since been refused.

Lord Justice Judge's was the first judgment. He observed: -

> Perhaps the starting point is a broad generalisation. When considering criticisms of actions and omissions forty years ago we have, always, to warn ourselves against the wisdom of hindsight, and recognise the potential unfairness of using knowledge accumulated during the last forty years which, by definition, was not
>
> available to the defendants. It has taken a very long time indeed for the true extent of the dreadful risks posed by exposure to asbestos dust to become known. As we shall see, the learning process has been gradual, beginning with those most obviously at risk, employees whose work directly involved such exposure. Morland J himself accepted that:
>
> > "There was nothing in the specialist safety, medical or factory inspectorate literature to alert Harland & Wolff to the risk of secondary exposure."
>
> That finding is unchallenged. Quite apart from the absence of any warnings of familial risk in the literature, Mr Clark was unable to identify a time prior to 1965 when, as a matter of prudent practice, careful employers began to address the danger of asbestos-related injury in the families of their employees. There is no evidence in this case, and indeed there was none in Gunn, which suggested that, prior to 1965, the risk described by Morland J as "obvious" gave rise to any echoing concern among responsible employers for the safety of members of the family of employees who worked with asbestos dust, or indeed among those with wider responsibility for safety and health generally.

Lord Justice Judge held that it was not until Newhouse and Thompson's 1965 paper was published[25] that it was "recognized" that mesothelioma developed not only among those who worked with asbestos but also among those who lived within a relatively short distance (half a mile) of an asbestos factory, and among relatives of those who worked in them. Newhouse's conclusion was, *"There seems little doubt of the risk of both occupational and domestic exposure of asbestos."* He distinguished **Margereson** because, in Mrs Maguire's case, *"It was not established that the dust to which Mrs Maguire*

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[25] *Mesothelioma of pleura and peritoneum following exposure to asbestos in the London area* by Muriel L Newhouse and Hilda Thompson. British Journal of industrial Medicine 1965, 22, 261.

was exposed effectively replicated her husband's level of exposure, nor indeed that her level of exposure, if repeated in factory conditions, would have constituted a breach of duty to an employee."

He did not take account of the findings in the **Jeromson** and **Owen** cases because they did not touch on domestic exposure.

Judge LJ summarised it: -

57. As Morland J found, until 1965, notwithstanding the increasing concerns and developing knowledge about the risks of exposure to asbestos among employees, nothing in the literature warned against the risks of familial or secondary exposure. On this topic, there was what appears to us now to have been a numbing silence. Before 1965 neither the industry generally, nor those responsible for safety and health, nor the Factory Inspectorate, nor the medical profession, suggested that it was necessary, or even that it would be prudent, for risks arising from familial exposure to be addressed by the industry. In truth, the alarm did not sound until late 1965, when it began to be appreciated that there could be no safe or permissible level of exposure, direct or indirect, to asbestos dust. Thereafter, the learning curve about the risks arising from familial exposure was fairly steep. In my judgment, however, Morland J's conclusion that the risk of serious injury to Mrs Maguire's health was "reasonably foreseeable, indeed obvious" to her husband's employers is not sustainable.

58. The issue remains whether Mrs Maguire has established that Harland & Wolff were negligently in breach of the duty owed to her as the wife of an employee working with and contaminated by asbestos dust. If so, liability would arise on the somewhat unusual basis that they failed to address a risk which had not yet been identified or addressed by anyone else, whether within or outside the industry. In the absence of any evidence from any source whatever of contemporaneous insight into familial risk, or any contemporaneous suggestion that the possibility of such risks should be addressed, I am unable to accept that by not later than 1960, and ahead of contemporary understanding, Harland & Wolff should have appreciated that Mrs Maguire was at risk of pulmonary or other asbestos-related injury, and that their failure to do so and to take appropriate precautions for her safety was negligent.

59. I should allow this appeal.

The dissenting judgment of Lord Justice Mance gave us some hope that the Law Lords would give permission to appeal, but permission was refused. Lord Justice Mance reached the opposite conclusion in this way: -

76. With regard to the 1960 booklet, Judge LJ has explained that the figure of 177 ppcc given in the List may be regarded as equivalent to 5/30 fibres per millilitre on a conventional UK scale (paragraph 32 above). He has also set out the joint experts' agreement as to the level of exposure to which Mrs Maguire may have been exposed, and Mr Clark's description of this (paragraphs 14-15 and 33). It is clear that her level of exposure would on average over a whole working day have been much lower than that contemplated as permissible in the 1960 booklet in the case of workers with asbestos. But, on the basis of Mr and Mrs Maguire's descriptions of the state of Mr Maguire's clothing, when he returned home, (paragraph 10 and 11 above), Mrs Maguire would, for at least a short period on many working days during the years 1960-65, regularly have exceeded the figure of 177ppcc given in the List.

77. The figures for permissible average exposure in the 1960 List were in the Factories Inspectorate 1968 booklet converted into maxima. That was after the end of the presently relevant period. I consider first whether it can be suggested that the appellants were not in breach of duty towards Mrs Maguire, since they did not expose her to any (average) exposure which would not have been permissible in relation to their employees. This line of reasoning would be consistent with that of Waterhouse J in *Gunn v. Wallsend Slipway and Engineering* (7th November 1988), but not with that of Buxton J in *Owen* or Mr Machell QC and this Court in *Jeromson*. In general agreement with the latter two cases, it seems to me that any such suggestion would miss the point of s.47 and of the Factories Inspectorate's booklets and reports. Because of the general and uncertain risks of asbestos dust (in particular), the primary pre-occupation of any employer should have been to reduce exposure to any such dust "as far as practicable". Neither the 1960 booklet nor the 1959 Annual Report can be read as legitimising a failure to take practicable steps to reduce exposure to dust, even if it happened that the average exposure was not thereby increased above that contemplated in the List. I refer to the first sentence under the heading *Permissible Concentrations* quoted in paragraph 74 above; the passage headed *Concentration of the dust* in the 1959 Annual Report also explains the List on the basis that "it was necessary to have some guide to which the efficiency of control measures can be related". The list was, in short, not a justification for foregoing practicable measures to reduce exposure to dust, but the minimum which should be achievable by taking all practicable measures. Here, as a matter of fact, there was a failure to take all practicable measures. As a result Mr Maguire was exposed to dust concentrations well in excess of any such minimum, while Mrs Maguire was exposed to a quite unnecessary extent. I do not accept that the appellants could expose Mr or Mrs Maguire to avoidable and unacceptable risks, but incur no liability simply by showing that the resulting level of exposure was on average below that to which

some other employer with no practicable means of doing better might, without negligence, in other circumstances expose an employee……

80. I accept that the passage in the 1960 booklet under the heading Personal Protective Equipment, on which the judge relied (paragraph 73 above), does not suggest any actual foresight of any risk of injury to persons in the employee's domestic environment. Nothing is said to suggest that employers should provide washing facilities for clothing at their place of business. The inference from the advice in 1960 might even be taken to be that employees should wear or at all events take their clothes home and wash or (very foreseeably) have them washed there. But, appearing in advice issued to the industrial world, the passage must, on

the face of it, assume that employers allowing such a system will in other respects be taking all practicable steps to reduce dust contamination generally and, as a result, on workers' clothing. Further, the general message in the passage is that exposure to asbestos dust from contaminated clothing can occur and should be avoided.

82. On the basis of the unchallenged statements of Mr and Mrs Maguire, this is a case where an employer simply disregarded proper precautions in relation to its employees. Proper practice was to eliminate dust so far as practicable, for the very reason that such dust creates a general undefined risk. The appellants' conduct failed fundamentally to eliminate dust as far as practicable. Very little thought would, on the face of it, have shown that such conduct was leading to the carrying of unnecessary dust outside the yard and an extended, even though general and undefined, risk elsewhere, of the same sort that it was undoubtedly the employers' duty to avoid as far as practicable within their yard.

83. If one asks, as one should, whether it was "reasonably foreseeable as liable to happen even in the most unusual case" that the deleterious effects of such unnecessary dust might in some way be felt outside the workplace by someone other than Mr Maguire, I therefore consider that the answer should be affirmative. Suppose that it had been the practice of all employees leaving the factory in their working clothes to go into a public house or corner shop just outside the factory, the present conduct would recreate a dust-laden atmosphere for them and others in that pub or shop. It was equally foreseeable that employees would go home in their working clothes, and carry dust there. Mrs Maguire's handling of the working clothes after Mr Maguire came home was entirely foreseeable, as was her exposure as a result to the same nature of conditions (dried and loose dust becoming airborne off clothes) against which the 1959 report warned. The law should not require absolute precision about the identity of the persons to whom injury might reasonably foreseeably be caused. It seems to me sufficient that Harland and Wolff's conduct, in allowing Mr Maguire to become excessively

contaminated to a quite unnecessary extent and to leave the yard in that state, clearly expanded the risks of asbestos to an extent which might affect third parties as well as Mr Maguire himself outside their yard.

84. I would have sympathy with Longmore LJ's application of Mustill J's dictum in *Thompson v. Smiths Shiprepairers* [1984] QB 405, 416B, if it had been the case that these appellants were keeping up to date, and that the conclusion that I favour would have meant that they were "ploughing a lone furrow". The reality, on the basis of Mr and Mrs Maguire's unchallenged statements, appears to have been that the appellants were behaving in disregard of any responsible and recommended practices at the time in the way they conducted themselves and allowed their operations to be conducted. There was a great deal of loose dust, no extraction system at all, and no warning of any danger of contact with asbestos dust. Mr Maguire and his clothing were as a result caused to be and allowed to remain heavily saturated in asbestos dust – much more so on the face of it than they should have been - and he carried this dust home with him. What happened was contrary to elementary procedures, as evidenced by the 1959 Annual Report. The appellants' actual conduct and foresight can on this basis be no touchstone of the reasonable. Nor do I regard the absence of any general identification in the literature of the risks in the domestic environment as a touchstone of reasonable foreseeability in the circumstances of this case. In its particular circumstances, I see no incongruity in holding the appellants responsible for the more remote consequences which, in my opinion, they *should reasonably* have foreseen might occur (even if only "in the most unusual case") as a result of their serious disregard of proper procedures for reducing asbestos dust as far as practicable. The literature made clear that the materialisation of the generalised risk to which asbestos dust gave rise varied according to a host of factors, including individual sensitivity. If one behaves irresponsibly, it may not be easy to foresee precisely all the consequences, but injury to others like Mrs Maguire was in my view sufficiently foreseeable. The appellants have of course been fortunate that Mr Maguire has not become ill. I would therefore dismiss this appeal.

All you can say about this case is that four very experienced Judges read the same material, which included all the relevant literature and case law about knowledge of asbestos risks: Morland J. and Lord Justice Mance came to one conclusion, and L.J. s Judge and Longmore came to the opposite conclusion. Surprisingly, the Law Lords cannot have thought the public interest issue was large enough to give Mr Maguire another hearing. Those dealing with the case for Mr and Mrs Maguire had always thought it was very difficult, but felt that date of knowledge in mesothelioma caused by contaminated clothes was a very worthwhile issue to have tested, and should have gone to the highest level of appeal.

I did a case for a roofer 10 years ago who died of mesothelioma. We sued his pre 1965 employers with whom his exposure had been heavy, and settled it. This year I did the case for his wife who developed mesothelioma from handling and washing his clothes. We had to sue his post 1965 employers because of the **Maguire** Court of Appeal decision. They represented a small

fraction of his total asbestos exposure, most of which was earlier than 1965. They paid compensation to her shortly before she died, but it would arguably have been fairer if the earlier employers had been obliged to contribute.

This leads into apportionment arguments in mesothelioma, with which Ronald Walker QC will deal.

4. CAPE plc PROPOSED SCHEME OF ARRANGEMENT

Summary*: Cape plc, one of the biggest UK asbestos defendants over many years, was hit by a group action by it former South African workers, and had to reach settlement contributing to UK Shipyard claims. It has a steady number of claims each year, growing in the case of mesothelioma, from its own former employees. As a result, Cape has proposed a Scheme of Arrangement under Section 425 of the Companies Act 1985. This is a legally binding compromise between a company and its creditors. Meeting(s) of creditors should vote on the Scheme, which has to be approved by a majority in number of at least three quarters in value of the creditors. The scheme then has to be sanctioned by the Court. None of this has happened yet, but Cape has indicated it will invest £7m to implement this Scheme and has written to former employees and interested parties with the proposals. This is an example of a big asbestos defendant, which is not insolvent, but can argue that it might become insolvent if its asbestos claims burden increased or its trading position worsened, invoking the protection of the Court.

Cape Plc, an English company, was formed in 1893 as The Cape Asbestos Company Limited, to acquire asbestos deposits in South Africa and a factory in Italy to produce asbestos-related products from the mines in South Africa.

By 1913, Cape was crocidolite mining in the Northern Cape and had a manufacturing plant at Barking in London.

In 1925 Cape acquired amosite mining operations the Transvaal, operated through wholly owned subsidiaries until 1979.

Dr Schefers visited Cape's Penge mine in Transvaal in 1949, and observed:

> ***"Exposures were crude and unchecked. I saw young children completely included within large shipping bags, trampling down fluffy amosite asbestos which all day long came cascading down over their heads. They were kept stepping lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate asbestos exposure. X-ray revealed several to have radiological asbestosis with cor pulmonale before the age of 12."***

Cape ran factories in Turin, until 1968, and in Johannesburg until about 1986.

Cape sold its South African mining operations in 1979. In 1981 Gefco, a subsidiary of Gencor, a South African mining company bought the operations.

Asbestos mined in South Africa was processed in South Africa, Italy, and England and then sold around the world, particularly in the United States. Cape's technical department at Barking patented asbestos goods which it sold throughout the world, including the US, through its subsidiary, North American Asbestos Company (NAAC).

Miners, workers transporting the fibre, dockers, ship workers, factory workers in South Africa and the United Kingdom and Italy, workers using the products, residents of mining areas, and people living near the UK factories, developed asbestos diseases.

Cape closed down its Barking factory as a result of the level of asbestos disease in the workforce there in 1968.

Cape eventually split its operation into Contracts and Products.

The Contracts arm of the group did well. Quoting from Cape's own literature:

"The Cape Contracts division saw rapid growth and undertook work in Europe and internationally through Cape Contracts International (later Cape East). In 1976 Cape Scaffolding Limited was created to service the access requirements of the Cape Contracts division and of external clients. Amalgamation of Cape Contracts and Cape Scaffolding occurred in 1994, resulting in the contracting organisation as it is today, Cape Industrial Services Limited."

In 2003 Cape PLC had a turnover of more than £230 million and employed a total of approximately 6,100 people world-wide operating in 22 countries across the world.

The Company and Group Head Office is located in the UK in Wakefield. Through its subsidiaries the company has 20 offices in the UK and Ireland and 19 overseas.

The structure of the Group in 2005 is:

- Cape PLC – Ultimate Holding Company
- Cape Industrial Services Group Limited – Holding Company of Cape Industrial Services Limited
- Cape Industrial Services Limited – UK Contracting Company
- Cape East – International Contracting Division
- Cape Hire – UK Hire Division
- Cape Security Services – UK Security Services Division
- Cape Training Services – UK Training Division

- Cleton Continental Europe BV – Dutch Contracting Company"[26]

Cape was sued by its South African workers and residents in the UK in 1997.

Cape applied to stay the South African claims on the basis of forum non conveniens, contending that the cases ought to be tried in South Africa. Cape won in the High Court in January 1998, but the Court of Appeal in July 1998 reversed this decision, and allowed the actions to proceed in London because the negligence of the English parent company was central to the case.

In early 1999 two new actions were started in London by 2000 South African workers. Cape re-applied to stay the 2,000 claims on forum non conveniens, arguing that the emergence of the group, about which it claimed to be taken by surprise, was a sufficiently material change to remit the cases to South Africa. Cape was successful in July 1999, and in November 1999, the Court of Appeal dismissed the workers' appeal.

The claimants appealed to the House of Lords, and the South African Government was given permission to intervene on their behalf in relation to public interest in favour of the action proceeding in the UK.

In July 2000, the Law Lords held that the case should be allowed to continue in London, stating that a case of such size and complexity required expert legal representation and experts on technical and medical issues, none of which could be paid for in South Africa.

Further claimants joined the case, so that by August 2001 about 7,500 were registered in the group.

Negotiations started between the claimants and one of Cape's shareholders, Montpelier, with a view to settling on better terms than Cape had originally suggested for a sum of £20 million. Montpellier took control of Cape, and in December 2001 a settlement agreement was signed. The agreement provided for payment of a total of £21 million through a Trust which was to be established in South Africa.

In August 2002 it transpired that Cape had run into financial difficulty and their bankers would not release the settlement money.

In September 2002 the court action had to be re-started.

Shortly before the collapse of the December 2001 settlement, a claim against Gencor on behalf of ARD victims from its South African operations had also begun in South Africa.

On March 2003, three settlement agreements were reached:

[26] Cape website homepage.

1) A settlement with Gencor for about £35 million. Of this about £3 million has been earmarked for environmental rehabilitation expenses.

2) A new settlement with Cape plc for the 7,500 claimants with a one off payment of £7.5 million plus costs by Cape Plc;

3) A settlement between the 7,500 claimants and Gencor for approximately £3 million.

Against the background of the South African settlement, a steady stream of UK litigation costing approximately £4m a year, a shipyard exposure settlement of £2.6m in September 2003, and presumably after observation of the T&N Administration, Cape plc in June 2005 proposed a "Scheme of Arrangement." This is a mechanism designed to protect the company from asbestos disease claims, even though it is not insolvent.

Quoting Cape's publication again:

> *"The Group's results for the year ended 31 December 2004 were released on 23 March 2005. Group turnover from continuing operations, including its share of joint ventures was £238.9 million, up 4.6 per cent. on 2003 (£228.3 million) of which 72 per cent. was from the Group's operations in the energy sector. Total operating profit from continuing operations, including its share of joint ventures, increased from £3.5 million to £5.1 million. The Group's core business, Cape Industrial Services ("CIS") performed ahead of budget in 2004 and continues to win significant contracts both in the UK and internationally. CIS's order book remains robust in the UK and sales in the Middle and Far East continue to increase."*

The rationale and detailed proposals were set out in a stock exchange release by Cape on 16th June 2005.

"Cape PLC

- Proposed Scheme of Arrangement ("the Scheme") in respect of asbestos liabilities

- Placing to raise £32million

Rationale

- Cape's historical use of asbestos and its associated health risks has caused a rising number of claims which are expected to continue for at least the next 46 years.

- It is extremely difficult to predict the long-term financial impact on Cape and it is therefore important for Cape to develop a more secure financial base

from which to generate the funds needed to meet the claims.

- If the proposed Scheme is approved it will provide a significant de-risking for Cape, removing a significant obstacle to the Group's growth and so that it is better able to generate the resources needed to secure the continued payment of compensation to claimants.

The proposed Scheme

- Cape's largest exposure to asbestos-related liabilities remains UK-based claims which are principally made by employees who worked in a Cape factory and those who used asbestos as part of Cape's contracting operations (a liability usually shared with other contractors).

- Cape proposes to set up a £40m fund to be used in the settlement of a great majority of UK asbestos-related claims (Scheme Claims), not covered by previous settlements, in conjunction with a creditor and Court approved Scheme.

- Funds will be ring-fenced, separate from any other Cape assets or banking arrangements, in a newly formed subsidiary, whose board will include two independent directors who will represent claimants' (Scheme Creditors) interests.

- The initial funding of £40m, comprises:

  - £22m from the proceeds of the Placing
  - £3m from Cape's existing resources
  - £15m from increased bank facilities with Barclays Bank

- The £40m will cover the projected amounts of Scheme Claims, not covered by a contract of insurance, for the next 12 years plus three years of projected running costs.

- There will be an independent review every 3 years to determine the funding required to cover expected claims over the next 13 years. If, following the review there is any shortfall, Cape will top up the fund annually over the next three years out of available cash flows. The intention is that following such payments there should be sufficient to fund the payment of claims over the next 10 years. The fund is planned to exist for as long as there are Scheme Claims, currently estimated to be not less than 46 years.

- An independent actuarial review's 'best estimate' of discounted value of all UK asbestos-related claims (net of insurance and other recoveries) is £80.9m, of which approximately £10.7m come from UK shipyards covered by separate arrangements which are outside the Scheme. The 'lower' and 'higher' estimates in the review are £49.5m and £160.2m respectively.

- Scheme Creditors will be paid in full unless the Scheme funding falls below

60% of the anticipated claims over the next 10 years, when pro rata payments will be made until the funding level is adequately restored. In the event of no future funds being available from Cape, pro rata payments will be made until the funding is exhausted.

- In order for the Scheme to be approved by the Court it must have the overwhelming support of Scheme Creditors. **On the Scheme being approved by the Court, Scheme Creditors will be legally bound, other than in very limited circumstances, only to recover payment for any settled or agreed Scheme Claims from the fund and not from Cape thereby providing the Cape trading business with significant protection from insolvency.**

- Provisions protecting Scheme Creditors' interests will be introduced, including the creation of a special voting share in Cape, which will provide that until 2008 no dividends may be paid and thereafter only if the required funding level is more than 110%.

- The special voting share in Cape will be held by an independent trustee, The Law DebentureTrust Corporation p.l.c.

- It is expected that formal Scheme documentation should be dispatched to Scheme Creditors in August 2005, Scheme Creditors' meetings will be held in October 2005 and, if approved, final Court sanction will be sought and the Scheme should become effective in October 2005.

The Placing

- Cape is raising £32 million, before expenses, by way of the Placing.

- £22 million is intended to be used to provide part of the initial funding of the Scheme Fund, £3 million will be used to provide ongoing working capital for the Group and £7 million will be used to meet the costs of the Proposals. **The total costs of the Proposals of approximately £7million are made up as to £5.5 million for the Scheme and £1.5 million for the Placing.**

- The Placing is not conditional on the Scheme becoming effective. If the Scheme is not approved then the Placing proceeds will be used to:

- Reduce existing bank debt
- Meet the costs of the Proposals
- Provide ongoing working capital for Cape

Cape would continue to manage Claims as it does at present (i.e. pay out of operating cashflows). However, no part of the Placing proceeds will be specifically allocated for this purpose".

……..

Proposed Scheme of Arrangement in respect of asbestos liabilities
Placing of 29,090,910 new Ordinary Shares at 110 pence per share
Amendment of Memorandum of Association
Adoption of new Articles of Association
And
Notice of Extraordinary General Meeting

"History …..

"the net charge to the Group's profit and loss account (excluding the settlements made in respect of the South African claims and the Shipyards Claims referred to below), was in the Financial Years ended 31 December 2000 £4.4 million, 2001 £3.7 million, 2002 £2.4 million, 2003 £3.8 million and 2004 £3.7 million respectively. With the exception of the claims covered by the South African settlement, the overwhelming majority of these claims have been made by persons who were exposed to asbestos in the UK."

Implications of asbestos-related claims

"if there was a material deterioration in the Group's trading performance or a significant increase in either the number of asbestos-related claims or the quantum of damages the Group had to settle, it is unlikely that, in the absence of further external funding, the Group would be able to continue to meet claims. In those circumstances it is possible that the Directors would be faced with no alternative other than to realise the Group's principal assets and to commence the breaking up of the Group….

The Directors also consider that the uncertainty over asbestos-related claims has had a prejudicial effect on the growth, both organically and by acquisition, and perception of the Group and that while the uncertainty remains, the Group may not be able to fulfil its growth potential."

Current and future claims

"… an independent actuarial review of the Group's UK asbestos-related claims projects that claims will be received for not less than 46 years with an anticipated peak in the value of claims arising between 2025 and 2030. The aggregate projected discounted value, net of insurance recoveries, of all the Group's UK asbestos-related unpaid claims over the next 46 years, is, on the basis described under "Future Projections" below, estimated by the independent actuary, Tillinghast, to amount to approximately £80.9 million. This figure includes the Shipyards Claims which are estimated by Tillinghast (on the same basis) to amount to approximately £10.7 million."

***One of the worst features of the T&N and Cape situations is that the two biggest UK asbestos companies, both multi nationals, allowed themselves to end up in a situation without insurance to respond to many asbestos disease claims. They took out policies that excluded asbestos liability, or commuted policies and paid claims out of profits, making it virtually inevitable in the case of T&N which was exposed to US claims that it would run out of money to compensate victims*.**

This is the Cape "Scheme of Arrangement" explanation of their insurance position: -

"Insurance coverage and uninsured risks

The employers' liability ("EL") and public liability ("PL") insurance cover available to the Group to recover the costs of meeting industrial disease claims is variable. Not all Group Companies with liabilities have insurance cover in place and, where there is insurance, it often does not provide asbestos cover or incorporates a pneumoconiosis exclusion so that it does not respond in certain cases of asbestos disease.

Prior to January 1972 (December 1975 in Northern Ireland), it was not compulsory for employers such as the Group to have EL insurance. **Most of the earlier insurance policies of the Group have been commuted or discharged and, therefore, no longer respond.**

Certain of the Group Companies that undertook contracting activities held PL insurance policies until October 1984, but these generally excluded cover for asbestos diseases. From October 1984, although asbestos-related diseases were generally excluded, cover was given for claims arising from the companies' asbestos stripping activities in the UK. However, Cape's PL insurance was written on a "claims made" basis and unless claims were notified to the insurer during the period of cover (which, given the long term latency period of most asbestos-related diseases, is unlikely) the policies will not respond. Since 2003, the Group's asbestos-related PL insurance has been written on a "claims arising" basis, but it only responds to claims made in respect of exposure since the inception of the policies in 2003. FSCS does not provide any compensation in respect of PL claims…."

Benefits to Cape

"- the Group will be protected, to a significant extent, from the risks of insolvency if there is a significant increase in either the number of claims or the quantum of damages or costs the Group has to settle or a material deterioration in the Group's trading performance which would otherwise have caused the Group to be unable to settle Scheme Claims payable by it in full;

- the Group will have a stronger and more secure financial base from which the Directors believe it will be better able both to generate the resources

needed to secure the continued payment of compensation to claimants and to grow and develop the Group's business;

- the ability to use surplus cash flows to grow its business organically (in particular in the Middle East and on Sakhalin Island off the east coast of Russia) and by acquisition;

- the Group's profile and customer perception will be enhanced with a reduction in the risk of insolvency from liabilities for the Scheme Claims; and

- they will, in the medium term, enable the Company to be better placed to move to a position in which it would be able to declare dividends to Shareholders as and when it is prudent so to do provided the Scheme Funding Percentage is greater than 110 per cent.

Accordingly, the Directors believe that implementation of the Proposals will remove a significant obstacle to the Group's growth and will assist the Group in increasing its business activities as well as in providing increased financial security and stability and enhanced prospects for Shareholders."

My observations are that Cape may well be able to protect itself against asbestos claims at a time when there is no hint that it is about to become insolvent as a result of such claims, or at all. Others may well follow this example. Cape is willing to spend several million pounds to achieve this protection. If it can insulate itself from asbestos claims, it will become a more valuable Group. Cape has the best insolvency legal expertise that money can buy. Scrutiny or potential opposition is being organized by the Asbestos Victims Support Groups, working with a few committed volunteer lawyers, who are not insolvency experts. It is not a level playing field.

Anthony Coombs, 14th October 2005

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