

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 164 of 2009

BETWEEN:

WALLABY GRIP LTD & WALLABY GRIP (BAE) PTY LTD (IN LIQ)
Plaintiff

AND

AMACA PTY LTD
Defendant/Cross Claimant

AND

CSR LTD
Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 30 October 2009 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants and cross defendant.
2. The determination is to be made by me on the papers, on the assumption that the defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**) to the extent that they apply.

The Principal Proceedings

3. The matters before me are in effect the resolution of two cross-claims. In the principal proceedings (DDT 8130/2008) Barry James Ayres (**Ayres**) sued Comcare. Comcare cross claimed in that suit against Wallaby Grip Ltd (**WGL**) and Wallaby Grip (BAE) Pty Ltd (in liq) (**BAE**).
4. Mr Ayres' proceedings were resolved as against Comcare, WGL and BAE by the entry of judgment and without admission as to liability.
5. WGL and BAE now sue Amaca Pty Ltd (**Amaca**) seeking contribution or indemnity. Amaca has also filed a cross claim joining CSR Ltd seeking an equal contribution to its liabilities incurred by it in conducting the defence of the cross-claim or, alternatively, contribution or indemnity.
6. In order to understand the cross-claims it is necessary to undertake an analysis of Mr Ayres' allegations of exposure to asbestos and his related injuries.

Mr Ayres' Employment and Asbestos Exposure

7. Mr Ayres' suffered from mesothelioma. That diagnosis is not in dispute.
8. WGL and BAE have attached a copy of Mr Ayres' Statement of Particulars to their Amended Reply filed 23 June 2009 as well as a transcript of the cross-examination of Mr Ayres conducted on 24 December 2008.
9. I extract the following material from those documents:
 - (a) Mr Ayres commenced an apprenticeship with the Navy at Garden Island Dockyard (**Garden Island**) as a fitter and turner in January 1962.

(b) Mr Ayres' was fast tracked into Marine Engineering Training. He identifies by name 8 Australian Naval Ships he served on in this period (to 21 March 1967). He worked in the engine room and machinery spaces of the ships. He worked in the vicinity of ladders, riggers and welders. Mr Ayres removed gauges on the HMAS Hobart and came into contact with lagging.

(c) He saw ladders cutting off asbestos lagging from pipes. He says that dust went everywhere and covered all of the machinery. Riggers removed pipes that had asbestos lagging on it. The lagging was removed using a saw and dust was released into the air. Mr Ayres described that work as:

"I also recall riggers removing pipes which had asbestos sectional lagging on it. They used to cut the pipes with a saw but because it still had some asbestos lagging on it, when it fell to the ground, asbestos dust would go everywhere. The riggers would then rig the pipes and cut off the remaining asbestos lagging which caused more asbestos dust to be released into the air. When the pipes were reinstalled ladders would then replace the asbestos lagging. They would firstly cut the pipe sections to size and then secure it with a wire. They then put an asbestos slurry over the top of those pipe sections and they would then sew asbestos cloth around it. I also saw ladders mixing asbestos with water in a bucket. It was very dusty when they did this and clouds of asbestos went everywhere".

(d) Mr Ayres recalls his clothes being covered in asbestos dust. He was not given a mask.

(e) From 21 March 1967 to 5 September 1967 he worked away from Garden Island and there was no asbestos exposure.

- (f) From 5 September 1967 to 4 March 1968 he again worked at Garden Island in the diesel section of the vessels. He was present when ladders removed asbestos. He recalls Bell's Asbestos doing some of the lagging work at Garden Island.
- (g) On 5 March 1968 Mr Ayres commenced work for ANL. There were no ladders in his vicinity in this role. He does recall cutting asbestos sheets using snips and punches. On the occasions he removed asbestos he would wet down the area. He considers his asbestos exposure in this period (to 16 June 1970) to be "minimal".
- (h) He again worked Garden Island from 17 June 1970 to 16 July 1971. Lagging occurred but it was done out of hours and his exposure was "minimal" as he was not in their vicinity.
- (i) He again worked at ANL from 16 July 1971 to 1980. He considers any asbestos exposure in this period from removing asbestos pads from flanges to be minimal.
- (j) His final period of possible exposure to asbestos at the ANL container terminal from 1980 to March 1999. He conducted work on brake linings on cranes and forklifts, but does not describe what that work was. He considers any exposure would have been minimal.
- (k) Outside of work he recalls his father building a fibro extension to the family home in Belmore in 1956. He was in the vicinity of his father but was not allowed close during this work – any exposure was minimal. Similarly in 1984 he removed a fibro wall from his home in Cremorne. He took precautions to wet down the area and wear a mask and goggles. He was careful not to break the sheets.

The WGL and BAE Reply

10. In the Ayres' proceedings the contributions assessor determined that the liability should be split as between Comcare 50% and WGL and BAE 50%. As both cross claims seek relief by way contribution or indemnity I have assumed that the 50% that was attributed to Comcare (and the subject of a consent judgment) must be considered as excised or quarantined from these claims. Put another way, I am only considering whether and how much of the WGL and BAE liability should be attributed to Amaca and/or CSR. For that reason I do not propose to further consider Comcare in this determination.
11. WGL and BAE submit that they should together be considered as one entity for apportionment. WGL was in operation from the commencement of Mr Ayres' employment until 30 September 1966. BAE commenced operations on 1 October 1966. WGL and BAE did not operate simultaneously but there is a contiguous period in which one preceded the other. I am prepared to accept that WGL and BAE be considered as one entity.
12. WGL and BAE submit that it and Amaca should be placed in Category 1.
13. WGL and BAE submit that they did not have actual knowledge of the dangers of asbestos until the mid 1970s. On the facts of this case, where there are no category 2 defendants as cross defendants, and all other parties are category 1 defendants who are fixed with actual knowledge I do not think that that submission really goes anywhere.
14. WGL and BAE annexed the affidavit of Frederick Ross filed 10 December 1998. Mr Ross was a logger with Bells Asbestos and did work at Garden Island in the 1960s. In particular he did logging work aboard the HMAS Melbourne, a boat which Mr Ayres says he worked on and was exposed to

asbestos in. Mr Ross described the work he did and estimates that “75% of the new material was Hardies and twenty five percent of the material was Bells”: Affidavit para 88. He particularly identifies 85% magnesia as a product he used often. It is his recollection that of the work he did on naval vessels the pipe work was mostly done using 85% Magnesia sections: para 98.

15. WGL and BAE submitted that “in light of the statements of Mr Ross and Mr Ayres, the overwhelming majority of Mr Ayres’ exposure came from asbestos insulation on the turbine casings and steam pipes onboard vessels, which were insulated with the James Hardie ranges of 85% magnesia, High Temperature and caposite pipe sections, segments, blocks and composition”.

16. The ultimate submission of WGL and BAE was that apportionment attributed to it in the principal proceedings should be split equally between it and Amaca (i.e. as a proportion of the total liability and not taking into account the Comcare portion WGL and BAE 25% and Amaca 25%).

The Amaca Reply

17. Amaca did not dispute Mr Ayres’ diagnosis.

18. Amaca’s principal submission was that the description given by Mr Ayres of the products he was exposed to was insufficient to identify them as products manufactured by it or the Hardie BI partnership. That is, Mr Ayres does not identify products by a detailed description or product name. He refers to “pipe sections, slurry/lagging and asbestos cloth”. Amaca specifically denies ever manufacturing asbestos cloth.

19. Amaca does admit that between 1964 and 1974 the Hardie BI partnership (a joint venture with CSR Ltd and Bradford Insulation Industries Pty Ltd) was involved in the manufacture of 85% magnesia blocks, sections and plastic

composition. Hardie BI also manufactured super high temperature blocks in this period.

20. Amaca submits that each of WGL, BAE, CSR and it are category 1 defendants. There are no category 2 defendants.

21. In respect of liability Amaca submits that it is an innocent defendant for the purposes of cl 53 of the Regulations. As I understand it, a party can be identified as an innocent defendant by agreement between all defendants. It is not a position that can be found or declared by me as the contributions assessor. I do not choose to do so. Of course, should the matter proceed to trial Amaca may succeed in that submission.

22. As Amaca takes the position that it is an innocent defendant it does not make any submissions regarding the percentage apportionment that it, or the other parties, should be attributed.

The CSR reply

23. CSR's Reply was limited to the matters specifically relevant to contributions issues (Part 8).

24. CSR submitted that as all of the remaining parties are category 1 parties "the standard presumptions do not apply".

25. CSR made alternative submissions regarding its liability. Its primary submission was that products manufactured by it were not identified by Mr Ayres with a consequence that there is no proof he was not exposed to any products it manufactured in partnership with Amaca.

26. Its secondary submission was that the in situ pipes were not clearly identified by trade name or by when they were installed into the naval vessels. The inference being that liability for any asbestos materials installed or removed

prior to the existence of any relationship between CSR and Amaca could not be attributed to it. I think there is substance in that submission.

27. CSR further submits that any asbestos exposure in the period 5 March 1968 to March 1999 was minimal.

28. In respect of the affidavit of Mr Ross where he identifies Hardie's 85% magnesia as well as Bell's products as the ones used by him in lagging naval vessels at the Garden Island dockyard CSR submitted that it "is unable to confirm whether Hardies-BI supplied any partnership products to Garden Island".

29. CSR's conclusion in respect of its secondary submission was that on the available evidence the WGL and BAE cross claim should be attributed 40% to WGL and BAE and 10% to Amaca/CSR.

30. In respect of Amaca's cross claim against it CSR undertook an analysis based on time on risk (i.e. pre and post the commencement of the Hardie BI partnership on 28 September 1964) as well as ascribing periods of exposure as high (5 September 1967 – 4 March 1968), medium (3 January 1962 – 21 March 1967) and low (5 March 1968 – 16 June 1970, 17 June 1970 – 16 July 1971, 16 July 1971 – 1999) and arriving at the following apportionments:

WGL and BAE 40%

Amaca 6.26%

CSR 3.74%

Categorising the Parties

31. All parties are Category 1 defendants.

Findings Relevant to Apportionment

32. Mr Ayres' suffered mesothelioma, an indivisible injury.
33. Mr Ayres was exposed to asbestos principally in his time whilst employed at Garden Island working on naval vessels. His principal source of exposure arose by reason of being in the vicinity of ladders who removed and installed asbestos in naval vessels.
34. The asbestos removed and replaced was largely made up of loose composition asbestos, pipe sections and asbestos cloth.
35. None of the pipe sections used in his vicinity were identified by product name by Mr Ayres in his affidavit or in cross-examination.
36. Based on the affidavit evidence of Mr Ross I am satisfied that the pipe sections used in and around the naval vessels that Mr Ayres' worked on was principally Hardie's 85% magnesia product. That was manufactured by both Amaca, and later, the Hardie BI partnership.
37. There was some minimal exposure experienced by Mr Ayres' as a result of his direct contact with and removal of asbestos.
38. Where Mr Ayres describes his exposure as "minimal" and/or where precautions were taken in removal (i.e. use of water to wet down the site prior to removal) I have discounted the contribution to nil.
39. Doing the best I can, I find it is likely that 30% of the total remaining liability was due to the WGL and BAE products and 20% to Amaca / CSR. I reach that conclusion on the basis that the preparation of the loose asbestos prior to creating a slurry as well as the cracking and removal of the in situ product

would have contributed greater to the creation of asbestos dust than cutting, installation and removal of prefabricated compressed asbestos sections.

40. I make some allowance for exposure to pipe sections prior to the existence of the Hardie BI partnership (28 September 1964) and ascribe the 20% as between Amaca (12%) and CSR (8%).

41. As all of the parties are category 1 defendants I do not propose to adjust the Standard Presumptions.

42. Accordingly, the apportionment of the liability that does not include Comcare's 50% from the principal proceeding (i.e. the remaining 50%) is as follows:

- (a) WGL and BAE 30%
- (b) Amaca 12%
- (c) CSR 8%

43. I have not been asked to appoint a Single Claims Manager.

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David Jay

Contributions Assessor

13 November 2009