

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 130 of 2011 & CC1

Babcock Australia Pty Limited

Plaintiff

Delta Electricity

Main Cross Claimant

Power Technologies Pty Limited

First Cross Defendant

Amaca Pty Ltd

Second Cross Defendant

Wallaby Grip Limited

Third Cross Defendant

DETERMINATION

INTRODUCTION

By letter dated 21 September 2011 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal in these proceedings and the file of the Dust Diseases Tribunal in proceedings 277 of 2010 & 277 of 2010 CC1 (“the original claim”).

The file in these proceedings contains the following material upon which I rely in making this determination

1. Reply filed by Delta Electricity, the Main Cross Claimant – “Delta”
2. Reply filed by Power Technologies Pty Ltd, the First Cross Defendant – “Power”
3. Reply filed by Amaca Pty Ltd, the Second Cross Defendant – “Amaca”

In addition to the material described at 1-3 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

THE ORIGINAL CLAIM

I have attached to this Determination my Determination of the Original Claim. The Reply filed by Power states that the Original Claim was resolved by entry of a

Consent Judgment in the sum of \$345,000.00 on 17 February 2011. I do not understand there to any dispute about this.

STATUTORY FRAMEWORK

It is important to state the provisions of the *Dust Disease Tribunal Regulation 2007* (“the Regulation”) that are applicable to this claim for contribution.

Section 52 of the Regulation states:

(1) An agreement or determination as to apportionment among defendants for the purposes of this Division is conclusively binding on the defendants for the purposes of the settlement, or determination by the Tribunal, of the plaintiff's claim and payment of the plaintiff's damages.

(2) The agreement or determination is not binding for the purposes of the subsequent taking, or determination by the Tribunal, of a dispute between defendants as to apportionment

I have emphasised the reference to “*this Division*”, a reference to Division 5 of Part 4 of the Regulation that concerns the “*Claims Resolution Process for asbestos related conditions*.”

Division 6 of Part 4 of the Regulation concerns “*Special provision for apportionment claims commenced after plaintiff's claim finalised*”.

Clause 54 of the Regulation categorises the Cross Claim that commences these proceedings as “*the new cross claim*.” Clause 55 of the Regulation requires that a new cross claim be the subject of the claims resolution process. The note to Clause 55

of the Regulation states that “*Cross-claimants are not required to provide a statement of particulars for their cross-claim*” .

Clause 57 and Clause 58 of the Regulation should be reproduced here, for fullness;

57 Notice to original claim defendants of new cross-claim

(1) The initiating defendant must give notice in writing of the commencement of proceedings on the new cross-claim to each of the original claim defendants who was a party to the original claim at the time of the agreement or determination as to contribution on the original claim and must give that notice before or at the time that the statement of claim in the new cross-claim proceedings is served.

(2) The initiating defendant must also serve on each of those original claim defendants, at the same time as the statement of claim for the new cross-claim is served:

(a) a copy of the statement of claim for the new cross-claim, and

(b) a copy of the appropriately revised version of Part 8 (Apportionment of liability among defendants) of Form 2 of the initiating defendant’s reply to the original claim against the defendant (as served with the statement of claim for the new cross-claim).

(3) Each original claim defendant may elect whether or not to be subject to a new apportionment of liability on the original claim among defendants including any new defendants.

(4) An election must be made within 10 business days after the original claim defendant is served with a copy of the statement of claim for the new cross-claim

(5) An election is made by giving notice of the election in writing to the Registrar, the initiating defendant and each of the other original claim defendants, accompanied by

an appropriately revised version of Part 8 (Apportionment of liability among defendants) of Form 2 of the original claim defendant's reply to the original claim.

(6) Failure to elect within the required time constitutes an election not to be subject to a new apportionment of liability.

(7) If the initiating defendant or another original claim defendant did not file a reply to the original claim, an obligation under this Division to serve a copy of an appropriately revised version of Part 8 of Form 2 of the reply is to be read instead as an obligation to file and serve a reply under clause 26.

58 New apportionment under Division 5

(1) The provisions of Division 5 apply again in respect of the original claim and the original claim defendants (with the new defendants included as defendants to the claim), subject to the following modifications and clarifications:

(a) agreement as to apportionment must be reached no later than 70 business days after service of the statement of claim for the new cross-claim on the last of the new defendants,

(b) agreement as to apportionment is only required to be reached by (and is only binding under clause 52 on) such of the original claim defendants as have elected to be subject to a new apportionment of liability on the original claim and the new defendants,

(c) a Contribution Assessor's determination as to apportionment under Division 5 is to be made within 80 business days after service of the statement of claim for the new cross-claim on the last of the new defendants,

(d) the Contribution Assessor's determination is to be a determination of the contribution that each defendant is liable to make, including (in addition to new defendants) all original claim defendants whether or not they have elected to be

subject to a new apportionment of liability on the original claim but is not binding under clause 52 on an original claim defendant unless the defendant elected to be subject to the new apportionment of liability,

(e) the Contribution Assessor's determination cannot increase any contribution already determined by a Contribution Assessor in respect of an original claim defendant.

(2) A reference in this clause to the service of the statement of claim for the new cross-claim on the last of the new defendants is a reference to service of that statement of claim:

(a) if there is only one new defendant—on that defendant, or

(b) if there is more than one new defendant—on the last of the new defendants to be served.

Note. *Clause 52 provides costs sanctions if a defendant disputes the contribution that the defendant is liable to make and the judgment of the Tribunal does not result in material improvement of the defendant's position.*

I am arguably required by Clause 58(1) (c) of the Regulation to follow Clause 49(4) of Division 5 of Part 4 of the Regulation and have regard only to the plaintiff's particulars, the defendant's replies on "the claim" and the standard presumptions. It is not expressed in the Regulation whether I am to have regard only to the Replies filed in these proceedings or whether I can have regard to the Replies in the Original Claim. I consider that because of Clause 58(1)(d) of the Regulation it must be as a matter of logic that I am to have regard to all Replies including Replies in the Original Claim.

I note that I cannot increase contribution already determined on the original claim.

THESE PROCEEDINGS

My task in this Determination is limited to determining the contribution as between Babcock Australia Pty Ltd, Delta and Power. I consider that I can only determine the contribution to the damage caused by Babcock Australia Pty Ltd. I am fortified in this view by the submission made in the Reply filed by Amaca that attaches the decision of the High Court in *James Hardie & Co Pty Ltd v Seltsam Pty Ltd [1998] HCA 78.* I am not referred to any particular part of that Judgment. Adopting what understand to be the reasoning of the High Court it seems to me that Babcock Australia Pty Ltd is prevented from re agitating issues concerning the contribution of Amaca and Wallaby Grip and indeed likely AWI Holdings Pty Limited, Babcock International Limited and Eraring Energy that were also defendants in the original claim. I am unsure because I am not aware what Judgment was entered against those Defendants if any, or whether the proceedings were dismissed in an interlocutory manner.

The comments of Kirby J at paragraphs 76 to 85 of his Judgment are compelling. His Honour analyses the meaning of the words in the Statue the *Law Reform (Miscellaneous Provisions) Act 1946:*

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):

...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.

The emphasis added is mine. It seems to me that Babcock Australia Pty Ltd, having apparently failed to issue Cross Claims against Amaca and Wallaby Grip in the original claim, is prevented from now seeking contribution to the “same damage.”

I note also I cannot increase the contribution of Amaca and Wallaby Grip as part of this Determination.

For these reasons I decline to determine the claim for contribution against Amaca and Wallaby Grip.

Although it would seem Babcock Australia Pty Ltd is not required to file particulars its failure to do so means that I am left to determine contribution having regard to its Reply and the Replies filed by others in the original claim and the Reply filed by Power Technologies and Delta in these proceedings.

The Reply filed by Babcock Australia Pty Ltd in the original claim contains no reference to Power Technologies or to Delta. I am however to assume that Power Technologies and Delta are liable to contribute, and equally so unless otherwise satisfied.

Delta has issued a Cross Claim against Amaca, Wallaby Grip and Power Technologies in these proceedings. I have already noted that I cannot increase the contribution of Amaca and Wallaby Grip as part of this Determination.

The Reply filed by Delta attaches the Statement of Claim filed by Babcock Australia Pty Ltd. Without this document I would have been left without any evidence as to the basis of the claim for contribution by Babcock Australia Pty Ltd.

Babcock Australia Pty Ltd claims that Delta is liable to it for damage caused by the employment of Mr Johnstone at Vales Point Power Station from early 1960 to mid 1961 while employed by E A Goodwin Pty Ltd. In the original claim Mr Johnstone did not sue Delta in relation to this period.

It seems to me that for the reasons articulated by Kirby J at paragraphs 76 to 85 of *James Hardie & Co Pty Ltd v Seltsam Pty Ltd [1998] HCA 78* and in explication of why Babcock Australia Pty Ltd cannot proceed against Amaca and Wallaby Grip in these proceedings, there is doubt at common law as to whether Babcock Australia Pty Ltd can seek contribution to its damage from Delta or from Power Technologies; see the decision of His Honour Judge Curtis in *Krobar Investments Pty Ltd v Wallaby Grip (BAE) Pty Ltd (in liquidation) 2005 [NSWDDT] 58*. I note also the terms of Clause 58(1)(e) of the Regulation.

Therefore I propose to proceed with this Determination on the footing that I am concerned only with contribution to the damage of Babcock Australia Pty Ltd by Delta and Power Technologies.

The absence of any particulars or submissions from Babcock Australia Pty Ltd is problematic. I am left to determine the liability to contribute of Delta and Power Technologies on the submissions made by those parties. I am uncertain, apart from the Statement of Claim issued by Babcock Australia, of the facts and circumstances relied upon by Babcock Australia in seeking contribution.

It is apparent from the material filed in the original claim and from submissions made by Delta and Power Technologies in these proceedings that Babcock Australia constructed, designed and installed boilers in Power Station. There is no evidence what Babcock Australia did in connection with Vales Point Power Station. In these circumstances, and regrettably, I consider that I am unable to do anything else other than to apportion contribution equally between Babcock Australia , Delta and Power Technologies as I am obliged to do by the Standard Presumptions Clause 5(4).

I regard Babcock Australia as a “defendant” for the purpose of determining apportionment even though it is the initiating party. If one were to interpret the Regulation otherwise this would have the perverse result of Babcock Australia escaping liability altogether by Delta and Power Technologies being the only “defendants” liable to contribute to the damage of Babcock Australia.

I determine contribution to the liability of Babcock Australia to be:

- Babcock Australia Pty Ltd – 33.34%
- Power - 33.33%
- Delta – 33.33%

I have applied a very slightly increased contribution to Babcock Australia to permit the total to be 100%.

It is not my task to appoint a Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred,

14 October 2011

Annexure 1

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 277 of 2010 & 277 of 2010 CC1

Bruce Edward Johnston

Plaintiff

Eraring Energy

First Defendant/Cross Claimant

Babcock Australia Pty Limited

Second Defendant/ Second Cross Defendant

Babcock International Limited

First Cross Defendant

Amaca Pty Ltd

Third Cross Defendant

Wallaby Grip Limited

Fourth Cross Defendant

AWI Holdings Pty Limited

Fifth Cross Defendant

DETERMINATION

INTRODUCTION

By letter dated 8 December 2010 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal that contains the following material upon which I rely in making this determination:

4. Plaintiff's Statement of Particular ("Particulars")
5. First Defendant/Cross Claimant's Reply
6. Second Defendant/Second Cross Defendant's Reply
7. First Cross Defendant's Reply
8. Third Cross Defendant's Reply
9. Fourth Cross Defendant's Reply
10. Fifth Cross Defendant's Reply

In addition to the material described at 1-7 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

The Plaintiff is a 75 year old male who has allegedly contracted mesothelioma.

I record that in making this determination I have taken into account what has been included by the Defendants at each of their Replies. I have relied on the Plaintiff's

Amended Statement of Claim because it has been attached to various of the Defendant's Replies.

I refer to the parties as follows:

- First Defendant – Eraring
- Second Defendant/Second Cross Defendant– BAL
- First Cross Defendant - BIL
- Third Cross Defendant – Amaca
- Fourth Cross Defendant –WGL
- Fifth Cross Defendant -AWI

PLAINTIFF'S ALLEGATIONS OF EXPOSURE

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the plaintiff's respiratory system of asbestos dust and fibre.

The Plaintiff alleges that he was exposed in three distinct and material periods while working at Wangi Power Station. It seems to be common ground between the defendants that the Plaintiff's allegations of exposure in his Particulars are superseded by his allegations of exposure in the Amended Statement of Claim. Doing the best that I can I apportion the overall percentage of exposure between these three periods as follows:

- Arcos Instructions employment: 5%
- BAL employment: 90%

- Australian Asbestos employment: 5%

This is in large part based on the periods of employment referred to in an employment card said to relate to the Plaintiff attached to the BAL Reply.

CONTRIBUTION ASSESSMENT

Each defendant has filed a Reply that is very helpful. Each Defendant argues that its liability should be lower than the other Defendants. Without meaning to do any disrespect to the carefully constructed argument of each Defendant I will attempt to summarise the main points that are made in each Reply as relates to contribution.

Eraring

- It should only be categorised as a Category 2 Defendant because the installers of asbestos at Wangi Power Station were employed by other entities
- BAL should be categorised as Category 1 and Category 2 Defendant because it employed the Plaintiff and was an installer of asbestos
- The Standard Presumptions should be varied significantly against Amaca because of its size and sophistication

BAL

- It was only involved in the design and construction of the boiler house of Wangi Power Station and not the Turbine house
- The apportionment attributable to the other Defendants is higher than that of BAL due to prior findings of the DDT

BIL

- Eraring should be categorised as a Category 1 and Category 2 Defendant
- Each Defendant but particularly Eraring, Amaca and BAL are far more culpable than BIL

WGL

- It supplied Amaca products at relevant times and manufactured composition and rope but did not supply these products to Wangi Power Station
- Eraring should be categorised as a Category 1 and Category 2 Defendant

The argument as to categorisation of Eraring deserves amplification.

In these proceedings the Plaintiff alleges that his exposure occurred in the period from 1955 to 1959. The evidence relied on by WGL, although supportive of a conclusion that Eraring employed ladders and that it should therefore be regarded as an installer, relates to periods that post date the plaintiff's period of employment. I do not think I am permitted to draw an inference that Eraring employed ladders at a time that the Plaintiff worked at Wangi Power Station without evidence from the Plaintiff in these

proceedings that he worked at Wangi Power Station with ladders employed by Eraring.

Amaca

- Does not admit manufacture of any product to which the Plaintiff alleges he was exposed

AWI

- It should be regarded as an innocent defendant
- It should be regarded as a Category 2 defendant only

I conclude that for the Arcos period BIL, BAL, Amaca, WGL, and AWI are Category 1 Defendants and Eraring is a Category 2 Defendant.

I conclude that for the BAL period BIL, BAL, Amaca, WGL, and AWI are Category 1 Defendants and Eraring and BAL are Category 2 Defendants.

I conclude that for the Australian Asbestos period BIL, BAL, Amaca, WGL, and AWI are Category 1 Defendants and Eraring is a Category 2 Defendant.

Having regard to the totality of the Defendants' arguments I see no reason to alter the Standard Presumptions and I see no reason to vary the weighting of contribution as between the Category Defendants.

For the Arcos period contribution is 3.75% to Category 1 Defendants. This is to be divided equally between BIL, BAL, Amaca, WGL, and AWI (0.75% each).

Contribution of the sole Category 2 Defendant, Eraring, is 1.25%.

For the BAL period contribution is 67.5% to Category 1 Defendants . This is to be divided equally between BIL, BAL, Amaca, WGL, and AWI (13.5% each).

Contribution of the Category 2 Defendants is 22.5%. This is to be shared equally between the two Category 2 Defendants Eraring and BAL,(11.25% each).

For the Australian Asbestos period contribution is 3.75% to Category 1 Defendants.

This is to be divided equally between BIL, BAL, Amaca, WGL, and AWI (0.75% each). Contribution of the sole Category 2 Defendant, Eraring, is 1.25%.

I determine contribution to be:

- Eraring – 13.75%
- Amaca – 15%
- WGL – 15%
- BIL – 15%
- BAL – 26.25%
- AWI -15%

Given that there is no primary defendant I appoint at random BAL as Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred,

16 December 2010