

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 76/05 & 76/05/CC1

Donald Junior Bailey

Plaintiff

Amaca Pty Ltd

First Defendant

State Rail Authority of NSW

Second Defendant/Cross Claimant

Amaca Pty Ltd

First Cross Defendant

Wallaby Grip Limited

Second Cross Defendant

Wallaby Grip (BAE) Pty Ltd (in liquidation)

Third Cross Defendant

DETERMINATION

INTRODUCTION

By letter dated 20 November 2009 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:

1. Plaintiff's Statement of Particulars ("Particulars")
2. First Defendant's Reply
3. First Defendant's Amended Reply
4. Second Defendant's Reply
5. Second & Third Cross Defendants Reply

In addition to the material described at 1-5 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

I assume that each defendant sued by the Plaintiff, who is a 70 year old male who allegedly has asbestos related pleural disease and asbestosis, is liable to the Plaintiff.

I will refer to the Defendants in the following way:

- First Defendant – Amaca
- Second Defendant – SRA
- Second & Third Cross Defendants – WGL/BAE

There is a controversy as to whether SRA should be categorised as a Category 1 Defendant as well as a Category 2 Defendant. Doubtless SRA is a Category 2 Defendant due to its employment of the Plaintiff. The question as to whether it is properly categorised as a Category 1 revolves around an analysis of the definition contained in the Standard Presumptions. Note 11 to the Standard Presumptions me in concluding that SRA is properly regarded as a Category 1 Defendant. I consider that it is appropriate to regard SRA as a designer of plant and equipment that included asbestos as part of its design. I note that several other determinations of contribution have been on the basis of a conclusion that SRA, in factual circumstances similar to that of this plaintiff, is properly regarded as a Category 1 and Category 2 defendant.

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 three separate periods of exposure.

In 1959 to 1960 he was employed at the Brown Brothers Abattoir at Inverell. He experienced daily intermittent exposure while working in the vicinity of ladders. The asbestos insulation

applied by the ladders was James Hardie 85% Magnesia and cloth. The Plaintiff does not identify the manufacturer of the asbestos cloth. He considers that this period of exposure accounted for 5% of his total exposure.

The Plaintiff was employed by SRA from 1960 until the early 1970s. He moved around from time to time but in each of his different stations he was exposed to asbestos in the form of fibro sheeting and rope. He does not assess the relative extent of his exposure to either product. He considers that this period of exposure accounted for 85% of his total exposure.

The Plaintiff was exposed to James Hardie products while performing various renovations and building works on his property near Scone. He considers that this period of exposure accounted for 5-10% of his total exposure.

CONTRIBUTION ASSESSMENT

The Reply filed by Amaca makes the following relevant submissions:

- Due to the size and sophistication of SRA the Standard Presumptions should be varied upwards by 20% to the detriment of SRA.
- A decision of *Re Woelfl* of the DDT found that SRA had actual knowledge of the dangers of asbestos prior to 1960
- From 1976 Amaca provided warnings on its products as to the danger of asbestos and the safe use of its products

The Reply filed by SRA submits that this determination of contribution should follow the result that occurred in Re Woelfl which was apportionment of SRA 30%, Amaca 50%, WGL 20%. That submission might be sensible if I were permitted to know the facts in the decision of Re Woelfl which of course I cannot given that the SRA Reply does not attach the reasons for the decision.

The WGL/BAE Reply is helpful. It submits that WGL and BAE should be treated as one entity and I consider it appropriate to do so.

WGL/BAE points out that in respect of the categorisation of SRA as a Category 1 Defendant and Category 2 Defendant, there have been a number of other determinations of contribution that have concluded that SRA should be categorised as both a Category 1 Defendant and Category 2 Defendant.

The WGL/BAE Reply annexes information extracted from the 1959 SRA report that records that the SRA had annual turnover of 280,930,360 pounds for the prior year and 51,933 employees.

I consider that all of the Brown Brothers period of exposure should be borne by Amaca. All of the Scone property exposure should be borne by Amaca.

The SRA exposure is to be apportioned 65% to Category 1 Defendants and 35% to Category 2 Defendants. I consider that it is appropriate to adjust this apportionment so that it is shared equally between the Category 1 and Category 2 Defendants, i.e 42.5% to each. I can make no

relevant distinction between the SRA as employer on the one hand and Amaca, WGL/BAE and SRA on the other.

I apportion the 42.5% contribution equally between Amaca, SRA and WGL/BAE, i.e 14.17% each.

I therefore determine contribution to be:

- Amaca 29.17% rounded up to 30%
- SRA 56.67% rounded down to 55%
- WGL/BAE 14.17% rounded up to 15%

I appoint SRA as Single Claims Manager.

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

Toby Tancred

Date: 27 November 2009