

CONTRIBUTIONS ASSESSMENT DETERMINATION

COURT DETAILS

Court	Dust Diseases Tribunal of New South Wales
Registry	Sydney
Case Number	121/2011

TITLE OF PROCEEDINGS

Plaintiff	Keith Ross Bellchambers
First Defendant	Cockatoo Dockyard Pty Limited
Second Defendant	Comcare
Third Defendant	Amaca Pty Limited (under NSW administered winding up) (formerly James Hardie & Coy Pty Ltd)
First Cross-Defendant	Wallaby Grip Limited

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1. The Registrar of the Dust Diseases Tribunal referred this matter to me under cover of his letter of 16 January 2012, and pursuant to Regulation 49(1) of Dust Diseases Tribunal Regulation 2007 (DDT Regs) for the determination of the contribution that each Defendant is to make to the Plaintiff's claim, the parties having failed to reach agreement as to apportionments.
 2. The Plaintiff has sued 3 Defendants and a Cross-Claim has been brought against Wallaby Grip Limited. I list the Defendants and the action each has taken for consideration in this contributions assessment as follows:-
 - 2.1 First Defendant (Cockatoo) – a Reply has been filed by this Defendant;
 - 2.2 Second Defendant (Comcare) – a Reply has been filed by this Defendant;
 - 2.3 Third Defendant (Amaca) – a Reply has been filed by this Defendant;

2.4 First Cross-Defendant (WGL) – a Reply has been filed by this Defendant.

I note the submissions from the parties on the question of apportionment which are detailed and helpful.

3. **Basis for Determination**

3.1 DDT Reg 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-

- The assumption that each Defendant is liable;
- On the Plaintiff's Statement of Particulars (PSP) (Part 3 and Part 4) relating to his occupational and non-occupational exposure to asbestos; and
- On the Defendants' (for my purpose this includes WGL) Replies;
- On the Standard Presumptions as to apportionment.

3.2 The relevant "Standard Presumptions" are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 ("the Order") and these provide the basis for the apportionment between joint tortfeasors (I note Clause 5 of the Order and the factual considerations set out in Clause 3 of the Order). I refer to these Clauses in the course of this determination without setting out their terms, unless my reasoning otherwise requires it.

3.3 It is alleged that the Plaintiff suffers with asbestos related pleural disease with pleural plaques and pleural thickening. This is a divisible disease. Clause 5(8) of the Order directs the methodology which I should adopt in determining apportionments when considering multiple contributions to a claim involving a divisible disease. More specifically, this Clause directs that:-

- i) If I am satisfied by reference to the existence of separate periods of exposure then instead of the prescribed apportionment, I should make a differential determination of the contribution of each of those periods.
- ii) If so, I am to determine what proportion of the whole each separate period of exposure bears having regard to the number of periods, the length of such period and the duration of an intensity of exposure to

asbestos within each period and that I treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought to apply; and

- iii) I then apply the proportions set out in the Table which forms part of Clause 5(1) i.e. changing the apportionments for the different index periods.

4. **Clause 5(2) and Defendant Categories**

It is necessary for the purpose of the application of the Clause 5(1) proportions and relative culpability, to determine the Category of each employer as regulated.

- 4.1 As an initial observation and before consideration of subjective matters and the parties submissions, the Defendant would be categorised as follows:-

- **Category 1** Amaca and WGL;
- **Category 2** Cockatoo and Comcare.

This much is agreed by the Defendants in their Replies.

- 4.2 Clause 5(2) defines Category 2 Defendants as those which cannot be classified as a Category 1 Defendant including users of asbestos and products, plant and equipment containing asbestos as well as occupiers of premises containing them.
- 4.3 Beyond this classification of Cockatoo and Comcare however, WGL goes on to submit, based on a transcript of evidence in a matter of *Robert Stanley-Turner v. Cockatoo Dockyard Pty Ltd & Anor DDT 157/2009* dated 31 July 2009, that Cockatoo and Comcare were installers of asbestos products within the meaning of the Clause 5(2)(a) definition and further therefore that as contemplated by Clause 5(3) those 2 Defendants fall within both categories as installers and employers of the Plaintiff.
- 4.4 I note that Clause 5(3) specifically provides for the circumstance of a defendant falling within both categories as an installer and employer. Note 11 to Clause 5(2) states that the category of installer includes a company which is engaged to install plant or equipment which includes asbestos as part of its design. In my view the evidence I refer to in 4.3 above justifies the application of Clause 5(3). The evidence referred to with respect to Cockatoo and Comcare demonstrates that each did engage in such installation. It is not in my view apparent in or the

intention of the Clause 5(2) definition to exclude a company undertaking significant asbestos installation for itself from inclusion as a Category 1 Defendant. The reference to a “*user of asbestos products*” in Note 10 relates to “*such as a small building company*” and is not germane to an undertaking of the size of Cockatoo and Comcare.

- 4.5 Having regard to the determination that I have made that Cockatoo and Comcare should be included in both categories, I turn my attention to Clause 5(5). This addresses what are otherwise standard apportionments within defined exposure periods (Clause 5(1)) for defined Defendant categories (per Clause 5(2)) and provides inter alia that I may not impose “*a different percentage figure from the standard presumption within the variation band ... unless the Contributions Assessor is satisfied that it is appropriate to vary the standard presumptions in the particular circumstances of the individual case.*”
- 4.6 Given that Cockatoo and Comcare will on my determination attract an apportionment from their roles in both categories, I regard myself as constrained by Clause 5(5) from imposing other than the defined percentage amounts per Clause 5(1) for each of the index periods. I also have regard to the fact that though period 2 and 3 are of similar length, the Plaintiff’s 85:15 apportionment (4.7 PSP) appears already to take account of the intensity, duration and frequency such that any further weighting by me (3.3(ii) above) would not be reasonable in the particular circumstances of this individual case.
- 4.7 I am satisfied by reference to these factors, that notwithstanding the existence of separate periods of exposure that I should not, despite submissions made in the Reply of WGL that I should, alter the prescribed apportionment or make a differential determination of the contribution of each of those periods. I reserve however for discussion below the question of weighting as between Cockatoo and Comcare by reason of different durations of exposure for which each was culpable in what I describe as Period 2 below.

I proceed accordingly.

5. Periods of Exposure per 3.3(i) above:-

- 5.1 By reference to the PSP I am able to determine there are 3 distinct but relevant periods of exposure, being:-
- (a) Period 1 – January 1950 to June 1952 (30 months)
NSW employment with New Occidental Gold Mines;

- (b) Period 2 – January 1953 to August 1956 (44 months)
NSW employment with Cockatoo on inter alia Royal Australian Navy vessels (and Comcare is the successor to that Commonwealth liability) with exposure to WGL products;
- (c) Period 3 – January 1974 to December 1976 (36 months)
doing extension work on his house using Amaca's asbestos cement building products.

- 5.2 The Plaintiff provides a history at 3.1 of the PSP and inter alia describes asbestos exposure in Period 1 but writes it down as trivial (less than 1% overall of his total exposure). This contrasts to some degree with the history to which he declared in his Dust Diseases Board ("DDB") application (annexure "N" to the PSP) on 30 September 2010. In that, he says that at the New Occidental Gold Mines where he worked in Period 1 the *"machinery in the powerhouse had a lot of asbestos insulation material on and around it"* ... and that while it was mostly covered with "aluminium sheets" he recalled that work on the turbines involved removal of the aluminium sheets and that he recalled *"that the process of moving the insulation around released a fair amount of dust into the air"*. For that reason I am disinclined to ignore that exposure in this apportionment exercise as the Plaintiff suggests.
- 5.3 The 1st and 2nd Defendants point to this tortfeasor which is not sued as what has been generally described in circumstances like this as an "empty chair"; i.e. a culpable exposure for which no Defendant is sued, so that where there is a divisible disease, as here, that portion of culpability should not be visited on the Defendants sued. It is submitted by these Defendants, somewhat arbitrarily that this exposure was 5% of total exposure, so that only 95% of the Plaintiff's exposure should be compensated. I am of the view in seeking to resolve the percentage estimate made by the Plaintiff and the description to the DDB that each account was a genuine attempt to assess his own exposure to different reporters, but that I should ascribe 2% of the Plaintiff's total asbestos exposure to this period.
- 5.4 I see no reason to otherwise interfere with the Plaintiff's assessment that his exposure in Periods 2 and 3 was otherwise in a proportion of 85% and 15% respectively (4.7 PSP). I will reduce each of those by 1% to have regard to Period 1 and assess culpability based on a breakdown of the remaining 98% as between Period 2 (84%) and Period 3 (14%).

- 5.5 Cockatoo and Comcare argue factual matters for my consideration relative to the exposure in Period 2. More particularly, Cockatoo asserts against the determination of Johns J in *Browne v. Cockatoo Dockyard Pty Limited [1999] NSWDDT 22*, that it had the actual knowledge of the dangers of asbestos possessed by the Commonwealth and that the contribution of Cockatoo should otherwise be reduced because of the contractual relationship between Cockatoo and the Commonwealth. Comcare on the other hand argues against the Plaintiff's account of working on HMAS Voyager (by reference to its record as to the year of that ship's construction) and otherwise points to the Plaintiff's account of working on merchant ships rather than naval vessels (PSP 4.1) for the larger part of Period 2 as a reason for adjusting its contribution down relative to Cockatoo.
- 5.6 I accept that the Plaintiff's history of working on naval vessels in 4.1 PSP is confined to 12-18 months of the 44 months in Period 2. It appears reasonable that I should therefore weight the relative exposure between these 3 Defendants (who for the purpose of this assessment have disparate roles as Category 1 and Category 2 Defendants in Period 2). To have regard to this factor I shall apply a weighting ratio on the basis that Comcare is only there for 18/44 months in the period as both a Category 1 and Category 2 Defendant. WGL and Cockatoo as the remaining 2 Category 1 and Category 2 Defendants throughout the whole of Period 2, will suffer multipliers of 57/44 relative to Comcare's 18/44 for Category 1 liability and Cockatoo will bear 70/44 relative to Comcare's 18/44 for Category 2 liability to have regard to the directive in Clause 5(8) of the Order.
- 5.7 Amaca accepts its sole responsibility in Period 3 and I have determined this as 14% of the total liability.

6. **Applying the Clause 5(1) Apportionments [per 3.3 (iii) above]:-**

- 6.1 Pursuant to Clause 5(1) of the Order I therefore apply the following calculations. For the purpose of Period 2, I note that this falls within index Period 1 for the purpose of the Order so that Category 1 Defendants share in 75% of the liability and Category 2 Defendants, 25%. As noted, Amaca otherwise is responsible for its 14% share in Period 3.

6.2

Defendant	Category	Calculation	Apportionment
Cockatoo (employer)	2	$(25\% \times 84\% \div 2) \times$ WF 70/44	16.7%
Cockatoo (installer)	1	$(75\% \times 84\% \div 3) \times$ WF 57/44	27.2%
Comcare (occupier)	2	$(25\% \times 84\% \div 2) \times$ WF 18/44	4.3%
Comcare (installer)	1	$(75\% \times 84\% \div 3) \times$ WF 18/44	8.6%
WGL	1	$(75\% \times 84\% \div 3) \times$ WF 57/44	27.2%
Amaca	1		14%
Total			98%


7. **Apportionment between Defendants:-**

Cockatoo	43.9%
Comcare	12.9%
WGL	27.2%
Amaca	14%
"Empty chair"	2%

I accordingly assess the liability of the 4 Defendants in those proportions.

In the absence of agreement between the parties I am required pursuant to Regulation 61(3)(b) DDT Regs to appoint a Single Claims Manager. I appoint Cockatoo as the Single Claims Manager.

Dated this 1st day of February 2012



 Bernard J McHardy