

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No. 374 of 2009

BETWEEN: YEROA BINDY (FORMERLY KNOWN AS IAN COOK)
Plaintiff

AND: VERO INSURANCE LIMITED
Defendant

AND: WALLABY GRIP BAE PTY LIMITED
First Cross-Defendant

AND: AMACA PTY LIMITED
Second Cross-Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* ("the Regulations").
2. Regulation 49 of the Regulations requires the Contributions Assessor to determine the contribution of the Defendant and Cross-Defendants, and that is to be done on certain material, and then apply the Standard Presumptions.
3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standards Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.
4. In the present case the Plaintiff issued proceedings on 18 December 2009 against DDAL GR Pty Ltd (formerly known as RG Ladd Proprietary Ltd) (hereinafter referred to as "the Employer")

in respect of a claim for damages for a mesothelioma condition in respect of exposure to asbestos dust and fibre while employed by the Employer for 4 years and 3 months between about 1967 and about 1972 as an apprentice electrician.

5. In support of the Plaintiff's Statement of Claim, a Statement of Particulars was filed in the Court on 10 February 2010 and, so far as is relevant, provided:

- (i) The Plaintiff suffered from mesothelioma.
- (ii) Between 1967 and 1972 the Employer employed the Plaintiff, which was an electrical contracting firm specialising in air-conditioning, refrigeration and mechanical services.
- (iii) During the Plaintiff's employment with the Employer the Plaintiff worked on dozens of buildings undertaking electrical work.
- (iv) The majority of the work undertaken by the Plaintiff was air-conditioning and refrigeration work in plant rooms. The plant rooms house air-conditioning units, condensers, switchboards and often boilers. When these rooms were being constructed or reconditioned, various trades worked together, including electricians, plumbers, pipe fitters and asbestos ladders.
- (v) The Plaintiff claims to have worked in close proximity to asbestos ladders undertaking lagging work in plant rooms.
- (vi) The asbestos ladders generally used two types of material, namely pre-fabricated asbestos pipe sections and loose asbestos composition that was mixed by the ladders to create a slurry. When the work was being performed the dust went everywhere and it was impossible for the Plaintiff to avoid inhaling the dust and fibres.
- (vii) The asbestos ladders came from Bells Asbestos.
- (viii) The Plaintiff encountered the Bells Asbestos ladders on average once a month over his four and a half year employment, and such contact was anywhere from a couple of days to 5 or 6 days at a time.
- (ix) The Plaintiff worked in the construction of Nullimby for about 4 months. The Plaintiff spent on average 2 or 3 days per week installing electrical components on air-conditioning units of homes which units were located in large cupboards made from compressed asbestos cement sheets into which the Plaintiff drilled. The sheets had a name written in dark blue ink. When drilled, fine dust and fibre was given off which was inhaled by the Plaintiff.
- (x) The Plaintiff describes his exposure as being "grossly exposed to asbestos".

- (xi) "The Plaintiff's exposure to asbestos insulation products was greater than his exposure to asbestos cement products, details of which have been set out above."
- (xii) Dr William Oliver in his report of 28 January 2010 described the Plaintiff's work as follows:

"Mr Bindy's job was the installation of control systems and their appliances, and after pressure testing the boilers and pipes he would wire the controlling equipment while ladders were working around him putting in sheet asbestos, asbestos rope around pipes, and around joints often using an asbestos compound. There was much residue on the ducts and floors and this often stayed there throughout the month it would take to complete the job."

6. On 11 February 2010 the Plaintiff moved the Court to substitute Vero Insurance Ltd for the employer.
7. On 15 February 2010 Vero issued a Cross-Claim against Wallaby Grip BAE Pty Ltd (hereinafter referred to as "Wallaby Grip") on the basis of s.5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.
8. On 15 February 2010 an Amended Statement of Claim was filed which substituted Vero Insurance Ltd for the employer.
9. On 17 February 2010 the Defendant issued a Cross-Claim against Amaca Pty Ltd ("Amaca") on the basis of indemnity and/or contribution pursuant to s.23B of the *Wrongs Act 1958 (Vic)*.
10. The matter proceeded to hearing before the President on 24 February 2010 when each of the parties was represented, and the Plaintiff gave evidence and was cross-examined.
11. In the proceedings before the President, the Plaintiff tendered PX-1, which essentially repeated the matters contained within the Statement of Particulars insofar as exposure was concerned.
12. I have had before me a transcript of the Plaintiff's evidence and his cross-examination. In the course of his cross-examination the Plaintiff was tested as to what his specific memory is in relation to differing exposure. While it is true that the Plaintiff could recall only 75% of the ladders being from Bells, it is apparent that the Plaintiff's assertions in the Statement of Particulars as to the relevant contributions remain.

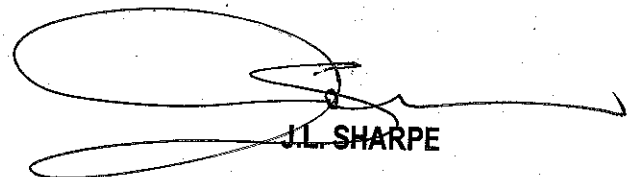
13. On 4th March 2010, Amaca filed a Reply which relevantly provides:
- (i) The terms "asbestos composition", "asbestos lagging" "prefabricated pipe sections" are generic terms;
 - (ii) Between 1964 and 1974 Amaca manufactured asbestos half pipe sections in conjunction with CSR Limited pursuant to the Hardies BI Partnership;
 - (iii) Bells manufactured or supplied half pipe sections and asbestos composition;
 - (iv) Page 2 of transcript referred to Bells ladders using half pipe sections which came in boxes marked "Bells";
 - (v) Page 32 of transcript referred to "Bestobell 85% Magnesia";
 - (vi) The Standard presumptions should be varied as against the employer by reason of it being a "large commercial entity with the sophisticated knowledge and work practices".
14. On 5th March 2010, Wallaby Grip filed a Reply which relevantly provides:
- (i) Denial of manufacture of asbestos half pipe sections;
 - (ii) Denial of manufacture or supply of asbestos cement sheets;
 - (iii) Between 1967 and 1972 it supplied James Hardie range of products;
 - (iv) Between 1967 and 1972 manufactured composition;
 - (v) Amaca was the sole manufacturer of 85% Magnesia Products;
 - (vi) The standard presumptions as against the employer should be varied.
15. It is apparent that the level of exposure during the whole of the period of exposure is roughly the same.
16. The whole of the period of exposure falls within Period B under Regulation 5 of the Standards Presumption Order, and thus the standard presumptions are that a Category 1 Defendant is to bear 65% and a Category 2 Defendant 35%.
17. On the information before me, I determine that the Employer falls within Category 2 and the Cross-Defendants each fall within Category 1.
18. In the present case, the standard presumptions take into account the various aspects of liability and, accordingly, there should be no variation of the standard presumptions.

19. Turning to the Cross-Defendants, it is apparent from the allegations made by the Plaintiff that there was a greater exposure to the Wallaby Grip product than there was to the Amaca product. While it is true that Amaca manufactured the half pipe sections and Wallaby Grip may have distributed such sections, and while it is true that Amaca manufactured the compressed sheeting even though it may have been distributed by Wallaby Grip, on the basis of the Plaintiff's assertions I determine that the contribution to be borne by Wallaby Grip and Amaca should be in the proportion of 60%/40% respectively.

20. Therefore, I determine the liability of the Defendants and Cross-Defendants (after rounding the figures off) as follows:

Defendant	35%
Wallaby Grip (60% x 65%)	39%
Amaca (40% x 65%)	26%
Total	100%

21. Pursuant to clause 61 of the Regulations, I appoint Wallaby Grip as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE

8th March 2010