

**DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT NO. 134 of 2011

**Joseph James Campbell
Plaintiff**

**Alstom Limited
First Defendant**

**Delta Electricity
Second Defendant and
First Cross-Claimant**

**Macquarie Generation
Third Defendant and
Second Cross Claimant**

**BHP Billiton Limited
First Cross Defendant**

**Union Rubber & Engineering
Pty Limited
Second Cross Defendant**

CONTRIBUTIONS ASSESSMENT

Preamble

The Registrar of the Dust Diseases Tribunal has appointed me as Contributions Assessor pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulation") and I have been asked to appoint a Single Claims Manager.

The plaintiff, Joseph James Campbell, sues the first defendant (his former employer), Alstom Limited ("AL"), the second defendant, Delta Electricity ("DE") and the third defendant, Macquarie Generation ("MG"), seeking damages for personal injuries alleged to have been sustained as a result of exposure to asbestos as more fully discussed later.

DE has issued a cross-claim ("DE cross claim") against BHP Billiton Limited ("BHP") and Union Rubber & Engineering Pty Limited ("URE") as more fully discussed later.

MG has issued also a cross-claim ("MG cross claim") against BHP and URE as more fully discussed later.

There is no reply to either cross-claim filed by URE.

The plaintiff alleges that as a result of his exposure to asbestos he contracted malignant mesothelioma.

Mesothelioma is an "indivisible disease" within the meaning of clause 5(7) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (hereinafter called "the Order").

The Task of the Contributions Assessor

The task of a Contributions Assessor is set out in clause 49(4) of the Regulation which is in the following terms:-

- " (4) The Contributions Assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:
- (a) the plaintiff's statement of particulars and the defendants' replies on the claim, and
 - (b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."

The plaintiff's statement of particulars will hereinafter be called "the Particulars".

Clause 49(4) of the Regulation is included in Part 4 of Division 5 of the Regulation as is clause 47(1) which provides that "A reference in this Division to a defendant includes a reference to a cross-defendant". Accordingly the contents of the replies of cross-defendants are taken into account in the same way as are replies by defendants and the assumption that defendants are liable extends to an assumption that cross-defendants are liable.

The standard presumptions become relevant in circumstances where there are different categories of defendants (as to which see clause 5(2) of the Order) in the proceedings. This aspect will be mentioned later.

The plaintiff's cause of action and his exposure to asbestos

The plaintiff's cause of action is pleaded in an Second Amended Statement of Claim ("SASC").

In the SASC he alleges that between about 1967 and about 1970 he worked as a foreman and boilermaker at various premises in the State of New South Wales including Vales Point Power Station ("VPPS") [paragraph 2B of the SASC]. The SASC does not identify his employer during this period. This matter will be mentioned later.

The SASC goes on to allege that "From about 1970 until about 1975" he was employed by AL as a supervisor at various premises in the State of New South Wales including VPPS, Liddell Power Station ("LPS") and Wallerawang Power Station ("WPS") (hereinafter collectively called "the NSWPS") as well as premises at Tennant Creek in the Northern Territory and Kalgoorlie in Western Australia.

The SASC further alleges that in the course of his employment he "handled, fit, cut, drilled, installed and removed asbestos-containing insulation" as well as being in the presence of other workers doing the same sort of activities. Those processes are alleged to have been injurious to him [paragraphs 4 & 5 of the SASC].

The SASC also alleges that "at all material times" processes involving the use of asbestos were carried out at VPPS, LPS and at WPS [paragraph 7 of the SASC] and further that the abovementioned processes gave off asbestos dust and fibre which was injurious to him [paragraph 8 of the SASC].

DE is sued as the successor in title to the Electricity Commission of NSW ("the ECNSW") in respect of VPPS and WPS.

MG is sued as the successor in title to ECNSW in respect of LPS.

The plaintiff alleges that throughout the course of his work at the NSWPS including during his employment by AL and otherwise he carried out (or was in the presence of others who carried out) the abovementioned handling, fitting, cutting, drilling, installation and removal of asbestos-containing

insulation products [paragraph 14D of the SASC] and that at all material times processes involving the use of asbestos were carried out in the NSWPS [paragraph 14F of the SASC].

DE and MG are alleged to be liable for such damages as might previously have been awarded against the ECNSW.

The Particulars disclose that the plaintiff was exposed to asbestos during the course of employment as an apprentice boilermaker by BHP at Iron Knob in South Australia between 1952 and 1957. That exposure to asbestos is not relied upon by the plaintiff in the SASC but is included in both the DE cross claim and the MG cross claim (hereinafter collectively called "the cross claims").

According to the Particulars, the plaintiff was in one continuous employment between July 1967 and 1992 even though during that period there were name changes to the employing entity [paragraphs 4.1.h & i of the Particulars].

It is to be noted that in the SASC the first defendant, AL, is described as being previously known, amongst other names, as SF Australia Pty Ltd.

A Contributions Assessor is to make the determination(s) of liability "on the assumption that the defendants are liable and solely on the basis of the plaintiff's statement of particulars and the defendants' replies on the claim".

The Particulars assert that the plaintiff was in continuous employment by AL and, accordingly, as the plaintiff's employment is pertinent to liability this assessment will proceed on the assumption of the correctness of that assertion which is wider, it must be said, than the allegation(s) of employment by AL as pleaded in the SASC. Perhaps at variance with the precise allegation(s) in the SASC (which does not specifically plead an end to the period of employment by AL) this will result in this assessment proceeding on the assumption that the plaintiff was employed by AL from July 1967 until 1992.

The Particulars [paragraph 4.1 a - g] shortly describe the plaintiff's work and working conditions when employed by BHP at Iron Knob.

The Particulars then describe, as previously mentioned,

[paragraph 4.1 h and following] his work "During the period from 1967 to 1992" when he "worked for a Swedish based company" (described in the singular) for which AL is alleged to be liable.

Pertinently to this assessment, the last mentioned description discloses:-

[a] From 1967 to 1969 the plaintiff had a direct hands-on role in the installation of asbestos. He describes working in confined spaces. There was a significant amount of asbestos in the air and it was inhaled. Specific mention is made of "During the period from about 1967 to about 1969" when he recalls "being exposed to asbestos during the course of my employment when working at the following projects":-

[1] In 1967 and 1968 for approximately 19 months while working at the BHP Internal Power Station being exposed to asbestos every day during that period; and

[2] for approximately 1.5 months working at VPPS again being exposed to asbestos during that period.

[b] For the period 1969 to 1975 he was a supervisor of sub-contractors who were carrying out the same type of work as had been previously carried out by him with the same levels of exposure to asbestos dust and fibre. Specific mention is made of working "on the following further projects":-

[1] in Tennant Creek in the Northern Territory at a metal smelter at Warrego for about 12 months in about 1971 and 1972;

[2] in Kalgoorlie in Western Australia at the Western Mining Corporation Nickel Smelter for about 3 months in 1972;

[3] at the LPS for about 3 months in 1971; and

[4] at WPS for about 2 years in 1973 and 1974.

[c] After 1976 and until 1992 he was largely involved in office administration and supervision with very little exposure to asbestos.

The foregoing summary of part of paragraph 4.1 of the Particulars is information provided in answer to the question "How were you exposed to asbestos?".

In the circumstances, all information provided in answer to that question is to be read as providing an answer to the question; ie "How were you exposed to asbestos?". That answer makes clear, as to the period between 1967 and 1975, that the plaintiff says his exposure to asbestos started in July 1967 and continued thereafter with his being able to provide some specific times and locations as part of the overall narrative.

Therefore, in summary of the Particulars, the plaintiff alleges that he was employed as an apprentice boilermaker by BHP at Iron Knob in South Australia from 3 March 1952 until 9 March 1957 being a period I determine to be 5 years (60 months). The plaintiff's best recollection is that he finished his employment with BHP 2 months later. However, the Particulars assert exposure only during his apprenticeship and accordingly this assessment will be restricted to that period. Conveniently, the whole of this period falls within Index Period A (see clause 5(2) of the Order) and this period (1952 to 1957) will be hereafter called "IP A".

By way of further summary of the Particulars, the plaintiff alleges he was employed by AL from (I determine 1st) July 1967 and was thereafter exposed to asbestos in the course of his employment until 1975 (which I determine to be 31 December 1975) (and falling wholly within Index Period B will hereafter be called "IP B") after which his exposure to asbestos, if any, was such as to be immaterial to this assessment and I so determine. I further determine that alleged period of employment to be 8 years and 6 months (102 months).

The Particulars further allege that during the course of that employment he was exposed to asbestos during the period from 1967 to about 1969 for:-

[1] approximately 19 months while working at the BHP Internal Power Station ("IP B.1"); and

- [2] approximately 1.5 months working at VPPS ("IP B.2");
- and that later, during the period between 1969 and 1975, he was exposed to asbestos for
- [3] about 3 months at the LPS in 1971 ("IP B.3");
- [4] about 12 months in about 1971 and 1972 in Tennant Creek in the Northern Territory at a metal smelter at Warrego ("IP B.4");
- [5] about 3 months in 1972 in Kalgoorlie in Western Australia at the Western Mining Corporation Nickel Smelter ("IP B.5"); and for
- [6] for about 2 years at WPS in 1973 and 1974 ("IP B.6").

The replies, cross-claims and replies thereto

AL does not admit (at present and subject to investigation) that it employed the plaintiff. However bearing in mind what a Contributions Assessor is required to assume, I determine the plaintiff to have been employed by AL from 1967 until 1992.

Against the background of the plaintiff's description of his work and the assertions by DE, MG and BHP that AL is a Category 1 defendant (and the assertions having been made I am required to so assume for the purpose of determining liability) I determine that AL is a category 1 defendant and, being also an employer, is also a Category 2 defendant.

It is common ground between parties which have filed replies that DE and MG are Category 2 defendants.

DE and MG cross-claim against BHP and URE seeking indemnity and/or contribution in respect any damages for which they may be found liable to the plaintiff.

The cross-claims against BHP rely on the plaintiff's exposure to asbestos during the plaintiff's employment during IP A and on his exposure to asbestos at the BHP Internal Power Station during IP B.1 and assert that BHP is both a Category 1 and a

Category 2 defendant.

The cross-claims against URE are based on the allegations that the electrostatic dust precipitators manufactured by AL, the plaintiff's employer, prior to 1975 contained asbestos manufactured by URE. The electrostatic dust precipitators are alleged to have been used in LPS and WPS. Neither cross-claim alleges the electrostatic dust precipitators were used in VPPS. It is to be further noted that the cross-claims against URE do not mention exposure to asbestos at Tennant Creek or Kalgoorlie. The cross-claims assert that URE is a Category 1 defendant and I so determine.

The reply by BHP admits that it employed the plaintiff between 3 March 1952 and 9 March 1957 and for period of 2 months after he finished his apprenticeship. That period of employment is recorded in a letter [Annexure 1 to its Reply]. That letter asserts the plaintiff was exposed to asbestos "on about a daily basis".

BHP does not admit the plaintiff's alleged exposure to asbestos and asserts that it ought be placed in Category 2.

Bearing in mind the assumptions a Contributions Assessor is required to make as to the liability of defendants (and cross-defendants) I determine that BHP is both a Category 1 and a Category 2 defendant.

Categories of the defendant and cross-defendants

Clause 5(7) of the Order requires, inter alia, a determination of whether the defendant and cross-defendants are to be classified as a Category 1 or Category 2 defendant according to criteria contained in clause 5(2) of the Order and I have made these determinations.

An indivisible disease

Clause 5(7) stipulates the procedure for calculation of apportionment of liability of the defendants where the subject of the claim is, as here, "an indivisible disease" and requires that "the apportionment will apply to the whole of the claim unless the Contributions Assessor is satisfied that by reference to the existence of separate periods of exposure, a differential determination of the contribution of each such separate period ought be made".

The whole of the period of exposure is [60 + 102] 162 months. I determine that the overall liability attaching to IP A is [60/162] 37.03703% and that liability attaching to IP B is 62.96297%.

BHP is only defendant liable in respect of IP A.

AS to IP B, there are [102 - (19 + 1.5 + 3 + 24 = 47.5 months)] 54.5 months in respect of which AL is solely liable and 47.5 months during which liability is to be shared between AL and others. Liability for IP B.4 and IP B.5 is not the subject of any cross-claim and rests solely with AL.

Liability for IP B.1 is to be apportioned between AL and BHP. Each has been determined to be both a Category 1 and a Category 2 defendant.

Liability for IP B.2 is to be apportioned between AL and DE (for VPPS). AL is a Category 1 defendant while AL and DE are Category 2 defendants. It is to be remembered that VPPS is not mentioned in the cross-claims.

Liability for IP B.3 is to be apportioned between AL and MG (for LPS) and URE. AL and URE are Category 1 defendants while AL and MG are Category 2 defendants.

Liability for IP B.6 is to be apportioned between AL, DE (for WPS) and URE. AL and URE are Category 1 defendants while AL and DE are Category 2 defendants.

Turning to the question of differential determinations, I am not satisfied that a differential determination of the contribution of each such separate period ought be made.

Index Periods and Standard Presumptions

Clause 5(1) of the Order stipulates Index Periods and standard presumptions apportioning liability between each category of defendants as, to some extent, explained in the Notes to clause 5(1).

Clause 5(5) of the Order provides that, inter alia, "there will be cases where it is appropriate for the Contributions Assessor to vary the standard presumptions However, a

different percentage figure from the standard presumption is not to be applied ... unless the Contributions Assessor is satisfied that it is appropriate ... in the particular circumstances of the individual case" as explained in the Note to that sub-clause.

I am not satisfied that there are particular circumstances here such that the standard presumptions ought be varied.

Calculation of apportionments

BHP is the sole defendant during IP A. I determine BHP to be liable for 37.03703% of overall liability.

The bases of calculation of the percentages of liabilities in respect of IP B have been explained.

I have determined that the percentage of liability for IP B.1 is to be shared equally between AL and BHP. IP B.1 is a period of 19 months as part of an overall period of 114 months. The whole of IP B is to be liable for 62.96297% of liability. The calculation of liability for IP B.1 is, therefore, $[19/102 \times 62.96297]$ 11.728395% which is to be apportioned equally between AL and BHP; AL is liable for 5.8641975% and BHP liable for 5.8641975%.

In respect of IP B.2, liability is to be apportioned between AL and DE. AL is a Category 1 and a Category 2 defendant while DE is a Category 2 defendant. The overall percentage of liability to be attached to IP B.2 is $[1.5/102 \times 62.96297]$ 0.9292075%. The Standard Presumptions applying to Index Period B require a ratio of liability of 65%:35% as between category 1 and Category 2 defendants. So as to maintain that ratio between one Category 1 defendant and two category 2 defendants, the Category 1 defendant will be liable for 48.148145% and the two category 2 defendants will be liable for 25.925924%; when these percentages are applied to the 0.9292075% attaching to this period, AL will be liable for 0.4473961% as the Category 1 defendant and AL and DE will each be liable for 0.2409055% as Category 2 defendants.

As to IP B.3 liability is to be apportioned between two Category 1 defendants and two category 2 defendants. So as to maintain the ratio of 65%:35% between the Category 1 defendants and the Category 2 defendants, each Category 1 defendant will be liable for 32.5% of the $[3/102 \times 62.96297]$

1.8518479% attaching to this period while each Category 2 defendant will be liable for 17.5% of the percentage attaching to the period. The result is that AL and URE are each liable for 0.6018505% of overall liability with AL and MG each liable for 0.3240733% of overall liability.

During the period IP B.6 there are two Category 1 defendants and two category 2 defendants. As with IP B.3. liability between the Category 1 defendants and the Category 2 defendants is maintained in the ratio of 65%:35% by each category 1 defendant being liable for 32.5% of the overall liability attaching to the period and each category 2 defendant being liable for 17.5% of the 14.814815% of overall liability attaching to the period. This results in AL and URE each being liable for 4.8148148% and AL and DE each being liable for 2.5925926%.

Apart from the periods of shared liability, AL is solely liable for 54.5 months of IP B being 33.641978% of overall liability.

Conclusion

AL is liable for 48.53%

DE is liable for 2.83%

MG is liable for 0.32%

BHP is liable for 42.9%

URE is liable for 5.42%

I appoint AL as Single Claims Manager.

Dated 28th November 2011

Peter O'Connor
Contributions Assessor