

MALCOLM LESLIE CLARK – v - DELTA ELECTRICITY

DELTA ELECTRICITY –v- POWER TECHNOLOGIES PTY LIMITED (FORMERLY INTERNATIONAL COMBUSTION OF AUSTRALIA LIMITED) & AMACA PTY LIMITED

DDT 8112 of 2008

DETERMINATION OF APPORTIONMENT

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that the Defendant and Cross-Defendants are liable to make pursuant to clause 49 of the Dust Diseases Tribunal Regulation 2007 (hereinafter referred to as "the Regulations").
2. By reason of clause 49 of the Regulations I am bound to assume that:
 - (a) the Defendant and Cross-Defendants are liable;
 - (b) the circumstances of the Plaintiff's exposure to asbestos are as set forth and as alleged by him.
3. Having made the assumptions above, clause 49 of the Regulations requires that my determination be made solely on the basis of:
 - (a) the Plaintiff's particulars;
 - (b) the Defendant's replies;
 - (c) the standard presumptions which are incorporated in the Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007 (hereinafter referred to as "the Standard Presumptions Order").

4. The standard presumptions in the Standard Presumptions Order requires that liability be apportioned upon the basis that the standard presumptions apply with such variations as are appropriate to the case but within a permitted range.
5. By Statement of Claim filed in the Dust Diseases Tribunal on 7 May 2008, Malcolm Leslie Clark (hereinafter referred to as "the Plaintiff") sued the Defendant alleging that between 7 September 1970 and 6 July 1998 the Plaintiff was employed by the Defendant at its premises at the Munmorah Power Station and Vales Point Power Station as an engineer, and during the course of this employment the Plaintiff was exposed to and inhaled asbestos dust and fibre. The Plaintiff alleges that the Munmorah Power Station and Vales Point Power Station were owned and occupied by Delta Electricity (hereinafter referred to as "Delta").
6. Delta has issued a cross claim against Power Technologies Pty Limited (hereinafter referred to as "Power Technologies"), and also against Amaca Pty Limited (hereinafter referred to as "Amaca").
7. The Plaintiff has provided a Statement of Particulars in which the Plaintiff makes the following allegations:
 - (i) The Plaintiff suffers from mesothelioma.
 - (ii) On 7 September 1970 the Plaintiff commenced work at Munmorah Power Station as a Grade 1 Engineer and he remained at the Munmorah Power Station until 26 September 1975 (hereinafter referred to as the "first period").
 - (iii) During the first period the Plaintiff was involved in the Maintenance Department that looked after the coal plant. He also was involved in the control systems section, the efficiency section and additionally performed some design work.
 - (iv) While performing the aforesaid work the Plaintiff alleges that there were a lot of tradesmen working in the power station and no areas were roped off and thus when asbestos was removed, it entered the atmosphere.
 - (v) The Plaintiff worked in the office of the power station but because of the nature of his work, which included supervision, he had to walk through the power

station on a regular basis.

- (vi) The Plaintiff describes the atmosphere in the power station in the first period as being very dusty and he breathed in the dust.
- (vii) The Plaintiff alleges that he had to visit the turbine house on a regular basis.
- (viii) There was asbestos insulation around the pipes in the turbine house and also asbestos installation in the turbine basement.
- (ix) The Plaintiff alleges that there was a lot of pipe work in the turbine house.
- (x) The Plaintiff alleges that there were 4 turbines in total and that the Plaintiff checked the temperature indicators on the turbines and the hydrogen purity.
- (xi) The Plaintiff alleges that there was regular maintenance in the turbine house as there was in the rest of the power station.
- (xii) The Plaintiff also alleges that he worked in the boiler house at Munmorah Power Station during the first period and that the boiler house was much dustier than the turbine house.
- (xiii) In the boiler house the Plaintiff had to inspect the welding outlets to increase the number of outlets for boiler repairs. All of the steam pipes and drain pipes in the boiler house were lagged with asbestos insulation. There were 4 boilers and there was continual movement and vibration with these boilers. This movement or vibration in turn caused the asbestos insulation to move as well, dislodging asbestos dust into the air, which the Plaintiff breathed in.
- (xiv) The Plaintiff alleges that the pipes in the boiler house were very dusty.
- (xv) The Plaintiff alleges there was also a milling plant and fans and these too were covered in dust.
- (xvi) In the power station, cleaners cleaned the floor on a weekly basis and the Plaintiff used to wear overalls and by the end of the day they were covered in dust including asbestos dust.
- (xvii) While performing his work at Munmorah Power Station the Plaintiff was provided with a paper mask, but because of the nature of his work he was not able to wear it all the time and, in any case, the mask was ineffective because dust got up under the mask and into his nose.
- (xviii) The Plaintiff alleges that during the first period the premises were very dusty and, while he did not handle asbestos insulation, he was present when others removed

it from pipes during this period. This lagging work was carried out while he was working in the power station. There was always regular maintenance work being carried out.

- (xix) Between September 1975 and July 1980 the Plaintiff worked as an Engineer Grade 2 at Vales Point Power Station (hereinafter referred to as the "second period"). The Plaintiff carried out mechanical maintenance of the boilers and milling plant and had to carry out boiler inspections when he inspected the tubes.
- (xx) While inspecting the boiler, asbestos dust was present.
- (xxi) The Plaintiff alleges that during a major inspection he went into the space where the drums and headers were, to check the welds. There was asbestos insulation present in this area and in the course of inspection he rubbed against the asbestos insulation and this would cause the asbestos insulation to dislodge which in turn caused asbestos dust to be released into the air. Additionally there was asbestos packing in valves, valve gland packing and expansion joints and in order to inspect the valves, valve gland packing and the expansion joints the Plaintiff had to handle the valves and this necessarily involves handling the asbestos packing. If there was a steam leak and some of the asbestos dust from the asbestos packing would be blown out. If there was a gas leak in the expansion joints this also caused asbestos dust to be blown out.
- (xxii) In the latter stages of this employment the Plaintiff took over the running of the Mechanical Boiler and Mill maintenance and still had to do boiler inspections and this involved some asbestos exposure.
- (xxiii) During the early stages of the Plaintiff's employment at Vales Point Power Station he wore a paper surgical mask similar to the one he had worn at Munmorah Power Station but he was not able to wear it all of the time because of the nature of his work and, in any event, because it was not effective.
- (xxiv) While working at Vales Point Power Station there were some changes to the work situation in that asbestos lagging was only removed at night and there was also a roping off of the area where asbestos was to be removed.
- (xxv) Between July 1980 and 6 July 1998 (hereinafter referred to as the "the third period") the Plaintiff returned to Munmorah Power Station as a Grade 3 Engineer working in the efficiency section and his main purpose was to monitor the plant.

He was responsible for weekly and monthly reporting.

(xxvi) To the best of the Plaintiff's recollection, Delta began to remove asbestos insulation during this period and he was not present when the asbestos insulation was removed as the area was roped off.

(xxvii) In January 1988 the Plaintiff was promoted to Engineer Grade 7, and ceased work on 6th July 1998.

8. Delta has filed a reply by which it alleges the following:

- (i) The Plaintiff may have been exposed to asbestos during his initial period of employment but that such exposure would have been limited in its intensity and duration. In other words, Delta admits that there may have been exposure during the first period.
- (ii) That during the first period the power station was operational and that only minimal maintenance work would have been carried out.
- (iii) That the Plaintiff worked in the offices of the power station and would have been exposed only when walking through or inspecting the power station.
- (iv) That the Plaintiff does not allege that he personally handled asbestos and alleges bystander exposure only.
- (v) In respect of the second period while the Plaintiff was at Vales Point Power Station Delta denies exposure.
- (vi) That on 25 November 1974 instructions were given by Electricity Commission of New South Wales, which regulated the handling of asbestos insulation product.
- (vii) The general standing instruction was updated on 15 September 1976.
- (viii) That the above guidelines imposed detailed instructions for the safe removal of asbestos.
- (ix) In addition, that Power Station B at Vales Point, which consisted of units 5 and 6, were almost entirely asbestos-free.
- (x) That the Plaintiff does not allege personal exposure to asbestos in the period and that accordingly as the removal or handling of asbestos was carried out in accordance with the regulations and protocols that exposure during this period would have been limited and should not be considered.

- (xi) In relation to the third period Delta refers to the fact that the Plaintiff does not allege exposure to asbestos.
- (xii) In relation to the period 1988 to 6 July 1998 Delta relies on the fact that the Plaintiff does not allege exposure in this period.
- (xiii) Delta therefore alleges that there was minimal exposure during the first period.
- (xiv) Delta should be placed in Category 2.
- (xv) Power Technologies should be placed in Category 1.
- (xvi) Amaca should be placed in Category 1.
- (xvii) Delta only had constructive knowledge before 31 December 1969 and had limited actual knowledge from 1 January 1970 and actual knowledge of the dangers of asbestos generally from 25 November 1974.
- (xviii) That the standard presumptions should not be varied on the basis of the identity, capacity, size or state or sophistication of the party except that Amaca should bear a higher percentage liability than any individual category 1 or category 2 defendant.
- (xix) Delta submits that in the period 1970-1975 Power Technologies and Amaca should be regarded as category 1 and Delta as a category 2.
- (xx) That Delta should bear 35% of the responsibility and Power Technologies and Hardies each bear 32.5%.
- (xxi) That there should be a variation of 10% applied equally to the Category 1 defendants with the result that Power Technologies be liable for 37.5%, Amaca be liable for 37.5% and Delta for 25%.

9. Amaca by its reply deals with the apportionment of liability in the following way:

- (i) Delta (as installer), Amaca and Power Technologies should each be placed in category 1 and Delta (as employer) should be placed in category 2.
- (ii) Amaca submits that Delta should be in Category 1 as it specified its use in contracts.
- (iii) The standard presumption should be varied by up to 20% as Amaca ceased manufacturing asbestos products in 1974.
- (iv) Amaca makes no specific submissions as to the break up of liability.

10. Power Technologies by its reply makes the following submissions:
- (i) That Power Technologies constructed 4 boilers at the Vales Point Power Station commissioned in 1963, 1964 (2), and 1965.
 - (ii) After the commissioning of the boilers Power Technologies did not perform any maintenance or rectification work at the Vales Point Power Station.
 - (iii) If there were any exposure in the first period, any exposure would have been as a result of maintenance or rectification work performed by Delta.
 - (iv) Power Technologies constructed 4 boilers at Munmorah Power Station, which were commissioned in 1967, 1968, 1969 and 1970, at a time when the Plaintiff makes no allegation of exposure to asbestos during the construction phase at the Munmorah Power Station site.
 - (v) Power Technologies left the Munmorah Power Station in 1970 and thus if there were any exposure in the second period, any exposure would have been as a result of maintenance or rectification work performed by Delta.
 - (vi) Delta falls into Category 2 as employer/occupier of the Power Stations.
 - (vii) Power Technologies and Amaca fall into Category 1.
 - (viii) That the standard presumptions should be varied as against Delta

CONCLUSIONS

11. The Plaintiff alleges exposure for the whole of the period of his employment.
12. It is obvious that the Plaintiff's exposure towards the end of his employment was much less than it was at the beginning of his employment.
13. Power Technologies was on site when the Plaintiff's exposure occurred, although there is some doubt as to the extent of any possible exposure.
14. Delta was not only the employer of the Plaintiff but also was responsible for the installation of the asbestos, in that it specified the use of asbestos in the power stations.
15. The Plaintiff's condition is an indivisible condition.

16. I have determined liability to contribute having regard to the relative culpability of the Defendant and the Cross-Defendants and the causal potency of the contributions.

DETERMINATION

17. I make the following determination:
- (a) The Plaintiff's condition is indivisible.
 - (b) The Defendant and the Cross Defendants each fall into Category 1 and Delta falls into Category 2 as well.
 - (c) For the purposes of this determination, the duration and intensity of exposure to asbestos during the periods of employment was greater in the first 5-year period of employment than subsequent.
 - (d) Given the fact that Delta was not only the employer of the Plaintiff but also was responsible for the installation of the asbestos in that it specified the use of asbestos in the power stations, and was responsible for the maintenance and repair work carried out at the Power Stations, it should bear 65% of the liability, with Amaca 20% and Power Technologies 15%.
 - (e) The standard presumptions should not be varied.



J.L. SHARPE

26 September 2008