

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 7284 of 2007

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Plaintiff

AND

**ACN 009 660 833 PTY LTD (FORMERLY BRETTS WHARVES AND
STEVEDORING CO PTY LTD**

First Defendant

AND

BURNS PHILP & CO PTY LTD
Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 25 June 2008 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants.
2. The determination is to be made by me on the papers, on the assumption that the Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**Standard Presumptions**).

3. The principal proceedings were between Stanley McLaney as plaintiff and The Stevedoring Industry Finance Committee (**SIFC**) as defendant. The Commonwealth of Australia now brings a cross claim in right of SIFC. The principal proceedings were settled between the parties on the basis that SIFC pay Mr McLaney \$65,000 inclusive of costs. The Commonwealth now cross claims against the first defendant, who I will refer to as Brett Wharves, and the second defendant Burns Philp & Co Pty Ltd (**Burns Philp**).
4. The Commonwealth has filed a Statement of Particulars in support of its claim. Brett Wharves and Burns Philp have each filed Replies. The defendants are both represented by Ferguson Lawyers and the submissions on contribution are identical. Where I refer to a submission by the defendants it is taken to mean that the submission was made in identical fashion on behalf of both defendants unless I indicate otherwise.

Mr McLaney's Employment and Asbestos Exposure

5. The Commonwealth has helpfully annexed the relevant documentation (Statement of Claim and plaintiff's affidavit etc) from the principal proceedings to its Statement of Particulars.
6. Mr McLaney describes his employment and history of exposure to asbestos in an affidavit sworn 16 August 2005. I rely on that affidavit to extract the relevant facts regarding his history of exposure and resulting injuries.
7. Mr McLaney alleged that he contracted asbestosis and asbestos related pleural plaques as a result of exposure to asbestos whilst working as a waterside worker in Brisbane for various stevedoring companies.

8. Mr McLaney worked as a casual floater from 11 July 1955 to 1967. From 1967 to 1988 he was a permanent waterside worker. He states in his affidavits that he did not work permanently for a stevedoring company until about 1980. From 1980 to 1988 he worked for Patricks and Conaust – Affidavit of McLaney ¶ 9. Mr McLaney states that he had worked on “every wharf along the Brisbane river” - Affidavit of McLaney ¶ 12.
9. From the first day of his employment until about 1978 he regularly unloaded raw asbestos cargoes on the Brisbane waterfront - Affidavit of McLaney ¶ 13. For that reason, he considers the vast bulk of his asbestos exposure occurred prior to 1978. I propose to accept that statement.
10. Mr McLaney recalls unloaded raw asbestos from two ships – the Sierra and Sonoma which came into Bretts Wharf about 4 to 5 times per year. He states further that “There were other ships which also brought in asbestos cargo but I cannot recall the names of those ships...The Sierra and Sonoma ships were usually unloaded by Bretts Stevedoring or Burns Philp Stevedoring as these companies did all the Stevedoring work at Bretts Wharf and this is where these two ships docked when they came into Brisbane.” - Affidavit of McLaney ¶ 18.

Categorising the Parties

11. All parties agree that each of the Commonwealth, Bretts Wharves and Burns Philp are Category 2 defendants.

Adjustment of Standard Presumptions

12. Mr McLaney’s injury was a divisible and so each of the parties are liable for the period of time they were on risk.

13. The Commonwealth made no submissions regarding adjusting the Standard Presumptions to take into account the level of knowledge attributable to each Category 2 defendant.
14. The defendants submitted that the Standard Presumptions should be varied to reflect that SIFC and the Australian Stevedoring Industry Authority, as agents of the Commonwealth, had actual knowledge of the risks of asbestos and referred to *Crimmins v SIFC* [1999] HCA 59 and *SIFC v Gibson* [2000] NSWCA 179.
15. I do not propose to adjust the Standard Presumptions on the facts available to me in this case. I do not believe there is sufficient evidence to apply an adjustment. It is preferable, in the absence of compelling evidence to adjust the Standard Presumptions, to simply adopt and apply those prescribed in the Order.
16. The Commonwealth submitted that I should apply a broad brush “just and equitable” approach to apportioning contribution and nominates a figure of 30% as the period on which each of the First and Second Defendants were on risk. It then says that, applying *Re Bowie; SIFC v James Patrick & Co Pty Ltd* [2005] NSWDDT 59 the stevedoring employers should contribute “in the ratio of 85% of the proportion to which the period of employment of the Plaintiff by that company to the whole period of causative employment”. Applying those two factors the Commonwealth submits that the liability of Brett’s Wharves and Burns Philp should be as follows:

$$30\% \times 85\% = 25.50\% \text{ (of \$65,000) } = \$16,575.$$

The Commonwealth would be liable for the balance of 51%.

17. The Defendants took a different approach to apportionment. In summary they submitted that the factual matrix described by Mr McLaney meant that they could only be on risk for 5% of his liability by reason of:

- (a) There being at least 25 stevedoring employers on the Brisbane River in the period 19955 – 1978;
- (b) Mr McLaney swore that he worked on every wharf along the Brisbane River;
- (c) The ships that Mr McLaney recalled unloading asbestos from were the Sonoma and Sierra but he does not state that he did not remove asbestos from other ships or at other wharves.
- (d) Assuming his exposure occurred with at least 20 different employers then the liability of each of Brett Wharves and Burns Philp is 5% (or combined 10%).
- (e) The Commonwealth is liable for balance of Mr McLaney's exposure.

18. The calculation given by the defendant if the presumptions are not varied is as follows:

Brett Wharves: 5% (shared liability with the Commonwealth) $\times 50\% = 2.5\%$

Burns Philp: 5% (shared liability with the Commonwealth) $\times 50\% = 2.5\%$

Commonwealth: $(5\% + 5\% - \text{shared liability}) \times 50\% + 90\%$ (sole liability) = 95%

19. I find that Mr McLaney did experience exposure to asbestos on wharves not operated by either of the defendants. I am not able to say with any certainty the exact period that the defendants contributed to Mr McLaney's entire exposure. Doing the best I can I consider it falls somewhere between the Commonwealth's suggestion of 30% and the defendants' suggestion of 5%. I nominate the figure of 20% each.

20. I further find that the stevedoring employers should contribute equally (ie 50%) with SIFC for the period that he was exposed to asbestos at the wharves of the defendants.

21. Accordingly the proportions are as follows:

- (a) Brett Wharves: $20\% \times 50\% = 10\%$
- (b) Burns Philp: $20\% \times 50\% = 10\%$
- (c) Commonwealth: 80%

22. I have not been asked to appoint a Single Claims Manager.

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David Jay

Contributions Assessor

29 June 2008