

DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT NO. 34 of 2011

Bennett Edward Dwyer
Plaintiff

Energy Australia
Defendant & Cross-Claimant

Babcock International Limited
First Cross-Defendant

Amaca Pty Limited
Second Cross-Defendant

Wallaby Grip Limited
Third 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, Bennett Edward Dwyer, sues his former employer, Energy Australia ("EA"), seeking damages for personal injuries alleged to have been sustained as a result of exposure to asbestos as more fully discussed later.

EA has issued a cross-claim seeking indemnity and/or contribution from the first cross-defendant, Babcock International Limited ("BIL"), the second cross-defendant, Amaca Pty Limited ("Amaca") (formerly known as James Hardie & Coy Pty Limited) and the third cross-defendant, Wallaby Grip Limited ("WGL"). The Cross-Claims are more fully discussed later.

The plaintiff alleges that as a result of his exposure to asbestos he contracted pleural 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. It follows that 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

The Particulars disclose that the plaintiff was employed by Sydney County Council ("SCC"), which later became known as EA, in March 1941 where he worked until his employment ended in 1986. Hereafter "SCC" and "EA" will be used interchangeably according to context.

According to the "Appointment" attached to the Particulars

the plaintiff commenced on 21st February 1941 as an apprentice electrical fitter on three months probation. His "Apprenticeship Indenture" (also attached to the Particulars) was dated 14th August 1941 and was for a period of 5 years from 3rd March 1941. On 11th March 1946, after completion of his apprenticeship, he was appointed an Electrical Fitter employed by SCC. On 19th June 1946 he was appointed "Electrical Fitter - Relay Testing" in the same employment. I infer that he concluded his apprenticeship on or about 4th March 1946.

In the Particulars the plaintiff says that "For about 12 months during my apprenticeship I worked at the Bunnerong Power Station ("the Bunnerong period").

In the Particulars the plaintiff says, more generally of his early employment, that when he started working for the SCC he was based in the city. He says he "spent time in the workshops". After describing the type of work he did he goes on to say that he "worked in the substations branch and in the meter branch on electrical meters and time clocks and I rebuilt and tested meters".

He goes on to say that after he had completed his apprenticeship, he worked for 6 months doing mainly copper work. He does not say that he was exposed to asbestos during this period.

After the 6 month period ("the 6 month hiatus") just mentioned, he "then returned to working in the city underground substations as an electrical relay tester". He describes the environment of the underground substations and his exposure to asbestos in that and/or those environment(s).

The nature and extent of his exposure to asbestos during his apprenticeship is described less precisely than is his exposure after the 6 month hiatus. However, after the 6 month hiatus he says he "returned to working in the city underground substations as an electrical relay tester". The fact that he "returned" leads me to infer that he had been working in the substations before the 6 month hiatus. In these circumstances I take the description of his exposure to asbestos after the 6 month hiatus as being a description of his exposure to asbestos, apart from the Bunnerong period, during his apprenticeship.

The 6 month hiatus, I infer, ended on or about 4th October 1946 (being 6 months after he had concluded his apprenticeship) although nothing turns on the date.

The plaintiff continued to work in the substations, both in the City of Sydney and in the suburbs, until 22nd September 1966 when he was appointed to head office where he worked in the control room until retirement. He does not describe any exposure to asbestos after September 1966 although, by implication from what he says, there may have been some exposure. I infer that he experienced either no exposure, or minimal exposure, after 22nd September 1966 and I determine the period of employment after 22nd September 1966 to be "immaterial" within the meaning of that word as used in clause 5(7) of the Order.

Based on the Particulars I determine the plaintiff to have been exposed to asbestos during his employment between 21st February 1941 and 22nd September 1966 except for the 6 month hiatus period. The whole of that period of exposure is 25 years and 1 month ("the overall period of exposure") which does not include the 6 month hiatus and of which overall period the Bunnerong period comprised 1 year.

The whole of the period of the plaintiff's employment between 21st February 1941 and 22nd September 1966 comprises 25 years and 7 months (25.58 years) and after the deduction of the 6 month hiatus, the overall period of actual exposure is 25.08 years.

The cross-claims

The cross-claim by EA seeks indemnity and/or contribution from BIL, Amaca and WGL in respect of the plaintiff's exposure to asbestos during the Bunnerong period and from Amaca in respect of the whole of remaining term of the plaintiff's period of employment.

The replies

In its reply, amended reply and further amended reply EA contends that the plaintiff's exposure to asbestos is different in duration from that which I have gleaned from the Particulars. To varying degrees the cross-defendants

either by implication and/or by contrary submissions in their replies do not accept, or contend against the EA contention(s) as to the plaintiff's exposure to asbestos.

In the circumstances and bearing in mind the assumptions required to be made by a Contributions Assessor I accept, and will make this determination based on, the plaintiff's history of his periods exposure to asbestos as set out in the Particulars.

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.

BIL, Amaca and WGL each accept that it is a Category 1 defendant.

EA contends that it is a Category 2 defendant.

BIL contends that EA is both a Category 1 and a Category 2 defendant because it "was both an installer of plant and equipment which contained asbestos (employing ladders to lag plant and equipment) and also an occupier of premises where products, plant and equipment which contained asbestos were situated".

Amaca and WGL contend that EA should be classified as a Category 2 defendant.

EA admits it employed the plaintiff and, in its capacity as an occupier, admits [paragraph 4.6] that it "knew or ought to have known that exposure to asbestos gave rise to a risk of personal injury (either of the kind suffered by the claimant or other personal injury) at the time of the alleged exposure". This admission is not easy to reconcile with the answers to other questions about the dangers of asbestos which EA gave in its capacity as the plaintiff's employer and elsewhere in the replies filed by it. It may well be that the answer in paragraph 4.6 is a typographic error although it seems strange that it was repeated in each

of the replies filed by it.

In the cross-claim EA alleges that Amaca was a "major manufacturer and supplier of asbestos products", that it "was engaged in the manufacture and supply of asbestos products" and that it "failed to warn the Plaintiff, other end users, or Energy Australia's predecessors of the danger of exposure to asbestos".

The complaint being made in the cross-claim by EA against Amaca is that EA was an end user of Amaca products and that it had not been provided with any warning of the danger of exposure to asbestos. This complaint does raise the question as to what was the end-use to which SCC was putting the asbestos supplied to it.

In the Particulars the plaintiff talks of the existence of asbestos lagging. His description leads to the conclusion that there was lagging in every substation which he visited. He says "Jointers used asbestos tape to lag the cables. I saw jointers working in substations while I was working in them. The jointers were based at a depot in Chippendale as far as I know. The supplies of asbestos were kept at the Chippendale depot. The jointers had a small trailer with all their gear including asbestos tape that they used to bring to each of the substations."

Accepting that this is a brief description it does, nevertheless, persuade me that SCC, the predecessor of EA, had full time employee "jointers" with a supply of asbestos tape which they installed in SCC substations including those substations visited by the plaintiff in the course of his employment.

Accordingly, I determine that EA ought to be classified as an "installer" of asbestos products as provided for in clause 5(2) of the Order and the Notes thereto.

EA was also as an occupier of premises wherein asbestos was situated being the Bunnerong Power Station and the substations.

Accordingly, I determine EA to be both a Category 1 and a Category 2 defendant in that it was an installer, an

occupier and the employer of the plaintiff.

During the 12 month Bunnerong period there are four Category 1 defendants (EA, BIL, Amaca and WGL) and one Category 2 defendant (being EA).

During the remaining period of the plaintiff's employment there are two Category 1 defendants (EA and Amaca) and one Category 2 defendant (being EA).

Pursuant to the provisions of clause 5(3) of the Order I am required to calculate a separate share for the role of EA in each Category.

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".

I am not satisfied that there is any ground for differential determination here.

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.

The plaintiff's cause of action commences in Index Period A and extends into Index Period B.

Index Period A is stipukated to be the period before 1st January 1961.

The period from 21st February 1941 until 31st December 1960 comprises (after deduction of the 6 month hiatus period) 19.35 (rounded) years while the period from 1st January 1961 until 22nd September 1966 comprises 5.73 years.

The overall liability of the defendant and cross-defendants, of course, amounts to 100% which over 25.08 years accumulated at an annual rate of 3.99%.

That proportion of overall liability which accumulated during Index period A is $[19.35 \times 3.99]$ 77.2% (rounded) and during Index Period B $[5.73 \times 3.99]$ 22.8% (rounded).

The standard presumption in Index Period A stipulates an apportionment of 75% to 25% between Category 1 and Category 2 defendants respectively while the ratio during Index Period B is 65% to 35% between Category 1 and Category defendants.

Calculation of apportionments

Index Period A includes the Bunnerong period which, being a period of 12 months, will attract 3.99% of overall liability to be apportioned between four Category 1 defendants (EA, BIL, Amaca and WGL) and one category 2 defendant (EA).

Accordingly (and maintaining the ratio stipulated as between categories of defendants) I determine each Category 1 defendant liable for 0.92% and the Category 2 defendant liable for 0.31%. There is some rounding in these calculations.

The remaining 18.35 years of exposure during Index Period A

will attract $[18.35 \times 3.99]$ 73.21% (rounded) of overall liability.

In respect of this period of 18.35 years there are two Category 1 defendants (EA and Amaca) and one Category 2 defendant (EA) between which (and maintaining stipulated ratios as aforesaid) I determine each Category 1 defendant liable for 31.38% and the Category 2 defendant liable for 10.45%.

During Index Period B overall liability amounted to 22.8% and during this Index Period there are 2 Category 1 defendants (EA and Amaca) and 1 Category 2 defendant (EA).

Maintaining the ratios between categories of defendants stipulated in Index Period B I apportion liability 8.98% liability to each Category 1 defendant and 4.84% liability to the Category 2 defendant.

Conclusion

I apportion to:

- [a] EA $[0.92 + 0.31 + 31.38 + 10.45 + 8.98 + 4.84]$ 56.88% of liability,
- [b] BIL 0.92%,
- [c] Amaca $[0.92 + 31.38 + 8.98]$ 41.28% and
- [d] WGL 0.92%.

I appoint EA as Single Claims Manager.

Dated 23rd May 2011

Peter O' Connor
Contributions Assessor