

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

**DDT No. 251 of 2009**

BETWEEN:

**ERARING ENERGY**

Cross Claimant

AND

**BABCOCK INTERNATIONAL LTD**

First Cross Defendant

AND

**BABCOCK AUSTRALIA PTY LTD**

Second Cross Defendant

AND

**AMACA PTY LTD**

Third Cross Defendant

AND

**WALLABY GRIP LTD**

Fourth Cross Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 21 December 2009 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the parties on the cross claim.

2. The determination is to be made by me on the papers, on the assumption that the cross defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007 (Standard Presumptions)* to the extent that they apply.

### **The Principal Proceedings**

3. Proceedings no 251 of 2009 is a cross-claim. In the principal proceedings (DDT 8261/2008) Leslie Lynne Elliott sued Eraring Energy (**Eraring**) as the legal personal representative of the estate of her father Nicholas Bradford (**Bradford**). Mr Bradford was the original plaintiff in the principal proceedings but passed away before they were determined or resolved.
4. Mr Bradford suffered from mesothelioma. His condition deteriorated rapidly and his death came at a time in the principal proceedings before he had filed his Statement of Particulars or Eraring had filed its Reply. Eraring settled the principal proceedings and judgment was entered by consent on 10 November 2008.
5. Eraring now sues Babcock International Ltd (**BIL**), Babcock Australia Pty Ltd (**BAL**), Amaca Pty Ltd (**Amaca**) and Wallaby Grip Ltd (**Wallaby**) seeking contribution or indemnity from the cross defendants.
6. Eraring annexed the Amended Statement of Claim and an affidavit from Mr Bradford sworn 29 September 2008 which detail Mr Bradford's alleged exposure to asbestos. I summarise Mr Bradford's allegations of exposure to asbestos as follows:
  - (a) On 1 January 1953 he was employed by Eraring's predecessor as a rigger. Prior to that he had various jobs that did not involve occupational exposure to asbestos.

- (b) He worked as a rigger for Eraring at the Bunnerong Power Station. He worked in teams that erected scaffolding to allow boilermakers, fitter and ladders to perform maintenance and repairs at the facility.
- (c) After the scaffolding was erected Mr Bradford remained in the vicinity to assist with running repairs if the other tradesmen needed assistance while they did repairs.

7. Mr Bradford then went on to say in his affidavit:

- “16. *Almost all of the work for which the scaffolding was required was maintenance on steam pipes. The steam pipes were lagged with asbestos insulation. Asbestos rope was wrapped around the pipes and then asbestos slurry was put over the top of the rope. On small jobs, the lagging was removed by ladders and a fitter or boilermaker performed the relevant repair work on site. The ladders then relagged the pipes. On bigger jobs, sections of pipe had to be removed and taken to the boilermakers’ or fitters’ shop for the repairs to be performed.*
- 17. *The ladders removed the asbestos insulation using a chisel. They tossed it onto the planks on the scaffolding or onto the ground. Sometimes I was next to them when they did this, on other occasions I was on the ground. Removing the lagging made a lot of dust which went into the air.*
- 18. *Once the work was done, the ladders relagged the pipe using new asbestos rope and asbestos slurry. To make the slurry, they used asbestos powder that came in hessian bags. They cut the bags open and tipped the contents into a bucket with water which they mixed up to make a slurry....A lot of dust went into the air when they did this. The ladders were as white as ghosts because of the dust when they did this work and the dust they made went everywhere.*
- 19. *Although I didn’t have to handle the asbestos myself except on the odd occasion, I was close enough to them for it to get all over me. I*

*remember the fibres stuck into my work clothes and I had to use compressed air to blow the dust off. All the workers did that and that sent more dust into the air.*

...

25. *I think there were four boilers in all at the Bunnerong power station. One boiler was shut down every so often for maintenance work to be performed. I erected scaffolding for that purpose. Lagers removed asbestos insulation and once the maintenance work was done, they relagged the boiler. The work the lagers performed made a lot of dust. The discarded lagging was dropped on the floor and later swept up by the cleaners. The boilers and associated pipework were relagged using asbestos rope and slurry.*

...

29. *I was exposed to asbestos dust every day I worked at the Bunnerong power station...*

8. Mr Bradford was given a gauze mask but described it as pretty useless.
9. Mr Bradford left the power station in late 1959. He later worked at CSR Pyrmont as a rigger. He was exposed to asbestos dust on a handful of occasions per annum. CSR is not a cross-defendant to these proceedings. Mr Bradford did not recall any other significant occupational exposure to asbestos. He was retrenched in the late 1980s and went on the aged pension. He started to experience the first symptoms of his illness in 2007.

### **Ering's submissions**

10. In making its submissions Eraring was synonymous with the legal predecessors to its business. In referring to Eraring in this determination I am also referring to those legal predecessors.

11. Eraring was the only defendant in the principal proceedings so there was no other defendant to contribute to the plaintiff's claim.
12. Eraring admits that it was an occupier of the Bunnerong power station. It submits, however, that at stages the site was "occupied and/or controlled by the respective contractors including BAL". It makes that submission on the basis that BAL had a site office, engineers and supervisors at the premises.
13. Eraring submits that its predecessors had no actual knowledge of the dangers of asbestos until about 1 January 1970 but accepts that they ought to have had constructive knowledge of the risk of personal injury caused by asbestos from the mid 1950s: Eraring Reply 4.6.
14. In respect of categorising the parties Eraring states that it should not be considered an installer of asbestos because its predecessors did not "*design, manufacture or install plant or equipment which included asbestos*": Eraring Reply 8.1.1. As to the installation it says that that was undertaken by BIL and BAL.
15. Eraring then made detailed submissions by reference DDT judgments regarding the categorisation of the parties. In summary, it submitted that the parties should be categorised as follows:
  - Category 1  
BIL, BAL, Amaca and Wallaby Grip
  
  - Category 2  
BAL and Eraring
16. Eraring submitted that there should be no variation of the standard presumptions resulting in a liability to each party as follows:

BIL	18.75%
BAL	31.25% (18.75% + 12.5%)
Amaca	18.75%
Wallaby Grip	18.75%
Eraring	12.75%

### **BIL's Submissions**

17. BIL conceded that it had known or ought to have known that asbestos gave rise to a risk of personal injury at the time of Mr Bradford's exposure. It draws the distinction between its knowledge regarding workers who engaged in processes in factories for more than 8 hours a day to that of bystanders such as Mr Bradford: BIL submission 6.5. It denies owing Mr Bradford a duty of care.

18. BIL states that there is no evidence from either Mr Bradford or Eraring that he was exposed to asbestos products from BIL and Eraring does not allege that BIL supplied asbestos to it. In the absence of that form of evidence BIL submits that it cannot admit that it breached any duty and that there is no causal relationship between it and Mr Bradford's injury: Reply 6.6 and 6.7.

19. Accepting that it falls within category 1 of the Standard Presumptions BIL's principal submission is that its liability should be reduced to "**NIL**". I understand the legal basis of that submission but cannot accept it in the context of this determination as I am bound to assume that all defendants are liable: Regulations 49(4).

20. BIL submits (in the alternative) that all parties should be placed into category 1 except for Eraring which should be placed in category 2 only. It submits that by reason of:

- (a) Eraring's size and sophistication;

- (b) The fact that it was Mr Bradford's employer and the occupier of the site;
- (c) Eraring's having actual knowledge of the dangers of asbestos;
- (d) The fact that Mr Bradford was given a mask by Eraring to protect against dust inhalation; and
- (e) Publications which indicate that Eraring had knowledge of the dangers of industrial dust (not specifically asbestos) in the workplace.

21. BIL further submits that if Eraring did not have actual knowledge then it must have been wilfully blind to the dangers of asbestos, encapsulating that concept as enunciated by Curtis J in *Re Hay (No 4)* [1999] NSWDDT 5 and *Re Raynor* [1999] NSWDDT 12.

22. It submits that Eraring's liability under the Standard Presumptions should be increased by a full 20%. It submits further that the liabilities of the other defendants should not be adjusted.

23. Assuming that I do not accept its liability should be nil the apportionment calculated by BIL is:

Category 1 (reduced by 20%)

BIL, BAL, Amaca and WGL       $55\%/4 = 13.75\%$  each

Category 2 (increased by 20%)

Eraring      45%

### **BAL's Submissions**

24. BAL specifically opposes Eraring's submission that it be placed in category 1 as an installer as well as category 2 as an occupier of the premises. It says that had installers also meant to be categorised as occupiers the Standard Presumptions would have been drafted with that concept specifically in mind.

If BAL is categorised as both an occupier and installer its liability is significantly increased over other solely category 1 defendants, such as manufacturers. I think that that is correct. The concept of “occupier” is a legal concept which should not, on the circumstances of this case, be extended to BAL.

25. BAL then makes the submission, somewhat similarly to BIL, that there is no specific allegation that its activities were responsible for Mr Bradford’s exposure.

26. As to apportionment BAL’s principal submission is that Eraring should be placed into both category 1 and category 2. It makes that submission on the basis that Eraring was an “installer” of asbestos products. It makes that submission by reference to paragraph 22 of Mr Bradford’s affidavit evidence that he “...took the lagging off as we went, chipping it off with chisel and removing it by hand. Hat made clouds of dust which went into the air”. I do not think that evidence moves Eraring into category 1. Clause 5(2) of the Standard Presumptions conceives an installer as the manufacturer of plant and equipment as well as a company which is engaged to install the plant in accordance with the manufacturer’s instructions. I do not consider Eraring’s business was manufacturing products with asbestos as part of its design and Mr Bradford’s evidence does not indicate that Eraring was in the business of installing asbestos.

27. BAL submits that Eraring had actual knowledge of the dangers of asbestos and relies on *Nicholls v Pacific Power* (DDT 104/97 – 26 November 1997). Its liability should be increased.

28. BAL states that to differentiate liability between the category 1 defendants with actual knowledge against those without actual knowledge inappropriately rewards “the more culpable defendants” to the detriment of the innocent defendants: BAL Reply 8.5.4. That submission would have more substance

in the context of contested claim in the DDT. By being categorised as a category 1 defendant BAL is assumed to have actual knowledge of the dangers of asbestos: Standard Presumptions CI 5. It is not appropriate to then find that BAL was without actual knowledge and to adjust apportionments according to the more and less innocent defendants.

29. BAL then refers to the decision of Judge Curtis in *Babcock Australia Ltd v Eraring Energy (Re Royal)*. In that case BAL was Mr Royal's employer but BIL's liability was apportioned 75% with 15% to BAL and 10% to Eraring. BAL then submits that, in accordance with *Royal*, its liability should be 1/5 of BIL's. It might be considered somewhat bullish to make that submission by reference to a single case. It would not be appropriate, for instance, to point to the decision in *Royal* and propose that BAL's liability should be 50% greater than Eraring, for instance. Relying on that reasoning BAL's liability would be increased disproportionately.

30. The reasoning of Judge Curtis in *Royal* was not constrained by the reasoning process of the Standard Presumptions. The Standard Presumptions can only be adjusted by reference to each "category of defendant". I do not consider that it allows a single defendant's liability within a category to be decreased by reference to another defendant at least without reference to the quantum or circumstances of exposure.

31. BAL submits that the liabilities should be as follows:

Category 1      Eraring 20%, Amaca 20%, BIL 20%, BAL 4%, Wallaby 11%

Category 2      Eraring 25%

### **Wallaby's Submission**

32. Wallaby admits that it manufactured asbestos rope and loose asbestos: Wallaby Reply 5.2.

33. Wallaby submitted that the parties should be placed into the following categories:

Category 1 Amaca, BAL, BIL and Wallaby

Category 2 Eraring

34. Wallaby submits that constructive knowledge should be attributed to Eraring. It submits that BIL and BAL's liability should be increased because BIL had actual knowledge of the dangers of asbestos from 1932 and that BAL had constructive knowledge by reason of its close association (parent company) with BIL: Wallaby Reply 8.5. Wallaby also adopts Eraring's submissions that Amaca's liability should be increased.

35. Taking into account the increases to be attributed to Amaca, BIL, BAL and Eraring the liabilities are as follows:

Category 1 Amaca (15%), Wallaby (10%), BIL (17.5%) and BAL (17.5%)

Category 2 Eraring (45%)

### **Amaca's Submissions**

36. Amaca submits that it did not manufacture asbestos rope. It also submits that the reference to "asbestos slurry" is insufficient to attribute to it exposure to asbestos products that it manufactured. For that reason it does not admit that Mr Bradford was exposed to products manufactured by it.

37. Amaca submits that the parties should be categorised as follows:

Category 1

BIL, BAL, Amaca, Eraring and Wallaby Grip

Category 2

BAL and Eraring

38. For the reasons stated previously I do not consider that BAL is a category 2 defendant in the circumstances of this case. Amaca submits that Eraring should be placed into category 1 because its employees were responsible for applying the asbestos and refers to paragraphs 13 and 17 of Mr Bradford's affidavit. I do not read those paragraphs (see above) as asserting that Eraring's employees were responsible for applying the asbestos. I think the identity of those employees is ambiguous and may well have been employed by BAL. I do not propose to place Eraring in category 1.

39. Amaca submits that by reason of the size and sophistication of the category 2 defendants means that their liability should be increased by the full 20%. It further submits Wallaby's liability should be further increased because it was the only supplier whose product was identified by Mr Bradford. It does not give a calculation of the proposed liability.

### **Categorising the Parties**

40. I have stated previously that I do not consider BAL to be a category 2 defendant or Eraring to be a category 1 defendant. I categorise the parties as follows:

Category 1

BL, BAL, Amaca and Wallaby Grip

Category 2

Eraring

## Findings Relevant to Apportionment

41. Mr Bradford suffered mesothelioma, an indivisible injury.

42. Mr Bradford was exposed to asbestos principally whilst employed at Bunnerong Power Station. His source of exposure arose by reason of being in the vicinity of ladders who removed and installed asbestos at the power station.

43. The asbestos removed and replaced was made up of loose composition asbestos and asbestos rope. Mr Bradford did not identify the asbestos products by brand name.

44. Each of the category 1 defendants has made submissions of substance as to why their liability should be reduced. It can be said that although Mr Bradford's evidence of exposure to asbestos is unequivocal the detail as to whose product, the specific location and boiler(s) where the work was undertaken or the proportion to each type of product was distinctly limited. For that reason I am not minded to adjust the proportions as between the category 1 defendants.

45. In respect of Eraring there appear to be a number of conflicting judgments regarding the extent of its knowledge as to the dangers of asbestos and the timing of when that knowledge was acquired. I do not propose to adjust its liability on the basis that it had actual knowledge of the dangers of asbestos at the time of Mr Bradford's exposure or that it wilfully disregarded the dangers of asbestos. It does seem to me, however, that it is appropriate to make an adjustment to take into account that Eraring (or its predecessors) were large and sophisticated organisations who employed a significant workforce and who required the installation and removal of asbestos on its behalf on a regular basis. For that reason I propose to increase its liability by 5%.

46. All of Mr Bradford's exposure occurred in period A.

47. Assuming that all of the category 1 defendants are equally liable the apportionments are as follows:

Category 1

BIL 17.5%

BAL 17.5%

Wallaby 17.5%

Amaca 17.5%

Category 2

Eraring 30%

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

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David Jay

Contributions Assessor

28 December 2009