CONTRIBUTIONS ASSESSMENT DETERMINATION

COURT DETAILS	
Court	Dust Diseases Tribunal of New South Wales
Registry	Sydney
Case Number	270/2011

TITLE OF PROCEEDINGS	
Plaintiff	Peter Joseph Finn
Defendant	BHP Billiton (formerly The Broken Hill Pty Co Ltd)
First Cross Defendant	Wallaby Grip Limited
Second Cross Defendant	Wallaby Grip B.A.E. Pty Ltd (ACN 008 453 325)

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1. The Registrar of the Dust Diseases Tribunal referred this matter to me under cover of his letter of 23 December 2011, and pursuant to Clause 49(1) of Dust Diseases Tribunal Regulation 2007 (The Regulations) for the determination of the contribution that each Defendant (which per Clause 47(1) includes Cross Defendants for the purpose of my exercise) is to make to the Plaintiff's claim, the parties having failed to reach agreement as to apportionments.

2. The Plaintiff has sued one Defendant which in turn has sued two Cross Defendants. Each has filed and served a Reply for consideration in this contributions assessment.

3. Basis for Determination

3.1 DDT Reg 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-

- the assumption that each Defendant is liable;
- on the Plaintiff's Statement of Particulars (PSP) (Part 3 and Part 4) relating to his occupational and non-occupational exposure to asbestos; and
- on the Defendants' Replies;
- on the Standard Presumptions as to apportionment.

3.2 The relevant "Standard Presumptions" are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 - Schedule 1 ["the Apportionment Order"].

4. The Relevant Operative Clauses of the Apportionment Order

4.1 (a) Clause 5(5) addresses what are otherwise standard apportionments within defined exposure periods (Clause 5(1)) for defined defendant categories (per Clause 5(2)) and provides inter alia that I may not impose *"a different percentage figure from the standard presumption within the variation band ...unless the Contributions Assessor is satisfied that it is appropriate to vary the standard presumptions in the particular circumstances of the individual case."*

(b) It is alleged that the Plaintiff suffers with mesothelioma. For the purposes of the Regulations and my assessment this is an "*indivisible disease*". Clause 5(7) directs the further methodology which I should (beyond simple imposition of the standard apportionments) adopt in determining apportionments when considering multiple contributions to a claim involving an indivisible disease. More specifically, this clause directs that:-

(7) Where the disease the subject of the claim is an indivisible disease (ie mesothelioma or lung cancer), the apportionment above 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 exposure period ought be made. If so, a determination will then be made of what proportion to the whole each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period. The standard presumptions will then be applied to each separate period. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial.

4.2 It is first necessary then, for the purpose of application of the Clause 5(1) proportions, for me to determine the Category of each defendant as regulated.

4.3 Clause 5(2) of the Apportionment Order defines Category 2 defendants as those which cannot be classified as a Category 1 defendant including users of asbestos and products, plant and equipment containing asbestos as well as occupiers of premises containing them.

4.4 Clause 5(2) (b) directs that Category 2 defendants include corporations who are employers of staff who in the course of, or as an incidental to their employment were exposed to asbestos.

4.5 In their Replies each of the defendants agrees that BHP is a category 2 and WGL and BAE are category 1 defendants but it is submitted by WGL and BAE that BHP is also, by virtue of its employing its own bricklayers to install asbestos insulation, a category 1 defendant pursuant to Clause 5(2)(a). Evidence of this is annexed to WGL and BAE's Replies and without adverting to it all I note for example the Statement of Peter Cross being Annexure A to the Replies of WGL and BAE and the detailed description therein of asbestos installation work performed by BHP employees.

4.6 Without repeating WGL and BAE's submissions on the point I concur that having regard to the nature of BHP's operation and its significant installation of asbestos installation that Clause 5(2)(a) does apply to it and accordingly that BHP sits in both categories for the purpose of my exercise. I therefore reject BHP's submission in its Reply at 8.1 that it is only a Category 2 Defendant and determine that it is also with the other 2 defendants a category 1 defendant.

I proceed accordingly.

5. **<u>Periods of Exposure :-</u>**

5.1 By reference to the Plaintiff's Statement of Particulars (PSP) I am able to determine there are 4 distinct but relevant periods of exposure. More particularly I note Part 3.1 of the PSP is the Industrial History of Mr Finn, and that in Part 4.1 he describes his periods of work (as Periods A-D which coincidentally or otherwise happen to happily co-ordinate with the index periods prescribed by Clause 5(1) of the Apportionment Order) and his exposure to asbestos dust and fibre relevant to my exercise herein being:-

(a) Period A – 1957 to 1961 - NSW employment with BHP with exposure to WGL asbestos products;

(b) Period B – 1964 to 1978/79 – NSW employment with BHP with exposure to WGL and BAE asbestos products;

(c) Period C – 1979 to 1989 self-employment in NSW;

(d) Period D – 1992 to 30 June 1999 employment in NSW.

For reasons I will set out below I am satisfied that a straight-forward application of the standard presumptions to the defendants as categorized affects an appropriate apportionment of liability between the defendants for the purpose of Clause 5(5) and that there is no role to play for Clause 5(7) with regard to these periods of exposure that would affect the prescribed apportionment. I set out these reasons more particularly in 5.7, 5.8, 6.1 and 6.2 below.

5.2 With **BHP** the exposure to asbestos in Period A occurred in the course of performing electrical work during his electrician's apprenticeship. Mr Finn generally describes his Period A work as daily handling of asbestos insulation products, often in confined spaces, with face in close proximity making it impossible not to inhale the asbestos dust so that at the end of each working day he was covered in asbestos dust which was "*all over my clothes and skin and in my hair and ears*"

5.3 With **BHP** again in Period B the exposure to asbestos occurred in the course of his employment as an electrician and performing maintenance and repair work *"to all four of the blast furnaces"* which required removal of old asbestos insulation and replacement with "*asbestos insulation products".* He describes *"handling, removing and replacing of asbestos insulation products"* as *"extremely dusty work".*

5.4 The Plaintiff's estimation of asbestos exposure during his self-employment in Period C is de minimis as it is for the Period D work with Carpenteria Electrical Pty Ltd i.e. from the occasional punching of holes through asbestos cement sheeting. No defendant is sued in relation to any possible exposure in these periods.

5.5 Mr Finn's account in 4.7 of the PSP is of percentile proportions of his total asbestos exposure being:

- in Period A - about 25%;
- Period B -about 73.5%
- Period C - 1%; and
- Period D - 0.5%

Having regard to the matters described by the Plaintiff and the statements of evidence relative to employment at BHP in the material generally, I accept those estimates without hesitation.

5.6 I am satisfied that the various exposures described by the Plaintiff allow me to affect objective fairness between the Defendants by exercising apportionment having regard only to Periods A and B.

5.7 Further, having regard to my indicated finding that BHP's contribution apportionment will arise from its roles both as a Category 1 and Category 2 Defendant I bear in mind the directive of Clause 5(5) of the Apportionment Order that as far as possible when applying any variation of the Standard Presumptions in the apportionment exercise I should be satisfied that it is appropriate to the particular circumstances of the individual case. WGL and BAE annex as E to their respective Replies a decision of Kearns J in *(re Floro) Bluescope Steel (AIS) Pty Limited V Amaca Pty Limited [2007] NSWDDT 27* where his Honour discusses the issue of knowledge of BHP, and in that case its related entity Bluescope. His Honour made conclusions in that matter (where of course the Standard Presumptions did not apply) ascribing 60% liability to the employer and 40% to the manufacturer because of what he found to be the higher duty on the employer. In dealing with a submission made to him in that matter His Honour acknowledged that Bluescope might according to the Standard Presumptions be a Category 2 employer "*when, because of its actual knowledge, it should really be treated as a Category 1 employer*".

5.8 Given that my exercise according to Clause 5(5) as mentioned above is to effect any variation that it is appropriate to the particular circumstances of the individual case I have regard to that more deliberate consideration given in Kearns J's decision in determining proportions of liability between a defendant, that he found to have BHP's knowledge, and the manufacturer of the relevant asbestos products concerned. I acknowledge that as His Honour points out in that decision, the Contributions Assessor's method is as prescribed by the Apportionment Order of 2007 as distinct from the exercise that he was undertaking therein. My role is as constrained by Clause 5(5) and with regard to the particular circumstances of the case. As I have determined that BHP is both a Category 1 and Category 2 defendant I am not persuaded by the submissions of WGL and BAE at 8.2, 8.5 and 8.7 that variation of the standard presumption should otherwise be made to further increase the

responsibility of BHP.

5.9 On 11 January 2012 I received a Supplementary Reply from solicitors for BHP. In this, the submission is made by BHP that it would be a jurisdictional error to assess BHP as both a Category 1 and Category 2 defendant.

5.10 I note that Clause 5(3) specifically provides for the circumstance of a defendant falling within both categories as an installer and employer. Note 11 to Clause 5(2) states that the category of installer includes a company which is engaged to install plant or equipment which includes asbestos as part of its design and in my view the evidence I refer to in 4.5 above justifies the application of Clause 5(3). The evidence referred to with respect to BHP demonstrates that it did engage in such installation. BHP's own description of itself as a "steel manufacturer" does not dispel the fact of its undertaking significant installation of asbestos at the Plaintiff's workplace. It is not in my view the intention of the Clause 5(2) definition to exclude a company undertaking significant asbestos installation for itself from inclusion as a Category 1 defendant. BHP's submission appears to mix the thrust of Note 10 with that of Note 11 by its submission that Note 11 *"makes it clear that Category 1 is not intended to include a mere user of asbestos products"*. The reference to a "*user of asbestos products*' in Note 10 relates to *"such as a small building company"* and is not germane to an undertaking of the size of BHP.

5.11 Attachment 4 to BHP's Supplementary Reply is a copy of the Affidavit of the Plaintiff sworn on 13 December 2011. At paragraphs 18 to 23 of his affidavit the Plaintiff describes his use of WGL's and BAE's asbestos products and I accept BHP's submission at 8.9 of its Supplementary Reply that it is incorrect for WGL and BAE to say there is no evidence that the Plaintiff was exposed to their products,

6. Proportional role of exposure period

6.1 Given that each of the Defendants were involved in the Periods A and B (noting that I accept that WGL's role as supplier ended on 30 September 1966 and

BAE's commenced on 1 October 1966) it is (on the basis of Clause 5(5) discussed above) appropriate for me to apply the Standard Presumptions without variation i.e. the percentage roles as described in Clause 5(1). More specifically I find it unnecessary to consider variations that might otherwise be directed by Clause 5(7). I simply note that the duration and intensity of exposure is the same for the relevant defendants in Periods A and B. BAE and WGL have submitted that I should consider Clause 5(8) but I believe this was intended to be a reference to Clause 5(7) since the Plaintiff's claim relates to an indivisible disease.

6.2 For the reasons set out in 5.7 and 5.8 above the proportional role will suffer adjustment by means other than a variation of the standard presumption because I have determined that BHP falls within both categories as an installer and employer. I determine that the cumulative apportionment of Category 1 and 2 assessments adequately and appropriately does the work of affecting a proper apportionment of the liability of the employer/installer with knowledge.

7. **Apportionment between Defendants**

I accordingly assess the liability of the 3 Defendants as set out below:

Period A (applying Clause 5(1) Category 1 @ 75% and Category 2 @ 25% to the Plaintiff's estimates as set out at 5.5 above:-

Party	Category	Calculation	% apportionment
BHP (employer)	2	25% x 25% =	6.25%
BHP (installer)	1	75% x 25% ÷ 2 =	9.375%
WGL	1	75% x 25% ÷ 2 =	9.375%
Total			25%

Period B (applying Clause 5(1) Category 1 @ 65% and Category 2 @ 35% to the Plaintiff's estimates as set out at 5.5 above:-

Party	Category	Calculation	% apportionment
BHP (employer)	2	73.5% x 35% =	25.725%
BHP (installer	1	73.5% x 65% ÷ 3 =	15.925%
WGL	1	73.5% x 65% ÷ 3 =	15.925%
BAE	1	73.5% x 65% ÷ 3 =	15.925%
Total			73.5%

I add equally in one third shares the balance of 1.5% estimated by the Plaintiff at 5.5 above to maintain the relevant proportions so that my assessment is as follows:-

Party	Calculation	Total
BHP	6.25 + 9.375 + 25.725 + 15.925 + 0.5	**57.775%**
WGL	9.375 + 15.925 + 0.5	**25.8%**
BAE	15.925 + 0.5	**16.425%**
Total		100%

In the absence of agreement between the parties I am required pursuant to Regulation 61(3)(a) DDTRegs to appoint a Single Claims Manager. I randomly select BHP.

Dated this 11th day of January 2012

Bernard J McHardy