

**DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

No 31 of 2011

**Yvonne Galleghan as Legal
Personal Representative of
the Estate of the late
Edmond Bull Galleghan
Plaintiff**

**Cockatoo Dockyard Pty Limited
First Defendant
& Cross Claimant**

**Comcare
Second Defendant**

**GIO General Ltd
Third Defendant**

**Wallaby Grip Limited
First Cross Defendant**

CONTRIBUTIONS ASSESSMENT

Preamble

The plaintiff, Yvonne Galleghan as Legal Personal Representative of the Estate of the late Edmond Bull Galleghan, sues the first defendant, Cockatoo Dockyard Pty Limited ("CD"), the second defendant, Comcare and the third defendant, GIO General Ltd ("GIO") (in its capacity as an insurer as later discussed) seeking damages for personal injuries suffered by the late Edmond Bull Galleghan ("the deceased") as a result of his exposure to asbestos as more fully discussed later.

CD has issued a Cross-Claim against Wallaby Grip Limited ("WGL") seeking indemnity an/or contribution in respect of any sum which it might be ordered to pay to the plaintiff in connection with any liability it might be found to have for the exposure of the deceased to asbestos.

WGL issued a cross claim against Amaca Pty Limited. I am

informed that this cross claim has been discontinued.

In the Statement of Particulars ("the Particulars") it is alleged that the deceased contracted asbestosis as a result of his exposure to asbestos.

Asbestosis is an "divisible disease" within the meaning of clause 5(8) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (hereinafter called "the Order").

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 in accordance with Clause 61(3) (b) of the Regulation she has asked me to appoint a Single Claims Manager.

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."

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".

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 deceased's exposure to asbestos

The Second Amended Statement of Claim ("SASC") and the Particulars disclose that the deceased was exposed to asbestos during the course of his employment.

In the SASC it is alleged that:-

- [a] the deceased was employed by CD from about 1 January 1960 to on or about 31 December 1961 ("Period 1") [paragraph 10];

- [b] from about 1 January 1967 to on or about 20 February 1976 he was employed
 - [1] by B McDonald Installations Pty Limited as a logger working at CD's premises [paragraph 11]; and during the same period

 - [2] was employed by businesses conducted by Mr Jack Stormont as a logger at premises and on ships in respect of which it is alleged Comcare is liable [also paragraph 11]; and

- [c] at various times from on or about 1 July 1976 to 26 September 1984 and from on or about 27 September 1974 to 31 December 1992 he was employed by entities known to the deceased as Challis Services and Stormont Services respectively performing lagging work at CD's premises and at premises and on ships for which Comcare is alleged to be liable [paragraph 13].

None of the businesses conducted by Mr Jack Stormont have been sued nor have Challis Services or Stormont Services.

Paragraph 3.1 of the Particulars record details relating to employment, work carried out and whether there was exposure to asbestos. In summary there are particulars of exposure to asbestos:-

- [a] between 1960 and 1961 in the employ of CD as a labourer;

[b] between 1967 and 1976 in the employ of B McDonald Insulations Pty Limited as a logger; and

[c] between 1976 and 1991 in the employ of "Jack Stormont/Challis Services" as a logger.

There is tension between some of the allegations in the SASC and details contained in the Particulars. In these circumstances it is pertinent to remember that a 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 the plaintiff's statement of particulars ...".

Accordingly, to the extent to which there is tension between the SASC and the Particulars, the assertions contained in Particulars will prevail and be adopted for the assessment.

There is also some tension between some aspects of the Particulars.

The last sentence of paragraph 4.1 of the Particulars says:-

"In relation to the circumstances in which Edmond was exposed to asbestos, I rely on his industrial history given to the Dust Diseases Board of NSW and dated 2 December 2010."

As part of that history [see page 3 of 9] it is recorded that "Mr Galleghan stated that for about a year between 1960-1961 he worked for wages at Cockatoo Dockyard as a general labourer".

Paragraph 10 of the SASC pleads a period "From on about 1 January 1960 to on or about 31 December 1961" which is clearly a period of 2 whole years. This pleading influences the meaning of that part of paragraph 3.1 of the Particulars which specifies a "Start date" of 1960 and an "End date" of 1961. Influenced by the pleading in paragraph 10 of the SASC, the period specified in paragraph 3.1 is understood by me to mean 2 whole years whereas the industrial history clearly mentions about 1 year.

The Particulars specify that the industrial history

abovementioned is to be read "In relation to the circumstances in which Edmond was exposed to asbestos ...". In other words, the industrial history is to be understood as relevant to the circumstances of exposure to asbestos but not relevant as to the periods of exposure.

Accordingly I think I am required to determine liability for this period of exposure (being the first period) on the basis that it is a 2 year period.

There is also tension as between the SASC and the Particulars as to the periods and/or places of employment by B McDonald Insulations Pty Ltd and the various Stormont businesses (including Challis Services). I think that read as a whole the Particulars (which prevail as abovementioned) make clear that the deceased was employed by B McDonald Insulations Pty Ltd between 1 January 1967 until 20 February 1976 ("Period 2") and was thereafter in the various Stormont related employments from 1 July 1976 until 31 December 1991 which year seems more likely on an overall reading of the Particulars than does 1992 as pleaded in the SASC (and this last mentioned period is hereinafter called "Period 3").

In these circumstances to the extent that part of paragraph 11 of the SASC alleges exposure to asbestos prior to 20 February 1976 in Stormont related employment at premises for Comcare might otherwise have been liable, it is at variance with the assertions in Particulars and those assertions prevail.

The exposure to asbestos during Period 3 occurred in the employ of the various Stormont entities at premises and/or places and ships for which CD and Comcare are variously alleged to be liable.

The circumstances of exposure during Period 3 is as recorded in the industrial history [page 5 of 9]. The description is not so precise as to enable a differentiation between the frequency, nature, extent or intensity of exposures for which either CD or Comcare are liable as compared to one another.

By way of summary of the plaintiff's allegations of the deceased's exposure to asbestos I determine that he was exposed to asbestos:-

[a] during Period 1 in the employ of CD,

[b] during Period 2 in the employ of B McDonald Insulations Pty Ltd at premises for which CD is alleged to be liable and

[c] during Period 3 in the employ of the various Stormont entities at premises and/or places and ships for which CD and Comcare are variously liable.

Replies by Defendants, Cross Claims and Replies by Cross Defendants

The Reply filed by CD admits that it employed the deceased but not during Period 1. It has attached to its Reply the deceased's employment card. This might be thought to be persuasive. However, I am required to assume that CD is liable as alleged by the plaintiff. Similarly, I am required to assume that CD is liable to the plaintiff based on the history of the deceased's exposure to asbestos (as set out in the industrial history [page 3 of 9]).

Comcare denies liability. As with CD, I am required to assume that Comcare is liable as alleged by the plaintiff.

GIO is sued as insurer of B McDonald Pty Ltd ("the insured") and, by reference to relevant tax returns, asserts that the deceased was not employed by the insured before 1 November 1968. As persuasive as that assertion is, I am required to assume that defendants are liable. Accordingly, I must assume that GIO is liable as alleged by the plaintiff.

The cross claim by CD against WGL is in respect of the first period and in respect of a period between 1963 and 1966 during which period CD "believes the deceased worked for it ...". At variance with this, the Particulars assert that there was no exposure to asbestos between 1961 and 1967. I am required to accept the accuracy of the Particulars.

In the circumstances, I determine that if there was any exposure to asbestos between 1963 and 1966 that exposure was immaterial.

Clause 5(8) of the Order

Clause 5(8) requires that where the subject of the claim is a "divisible disease" the Contributions Assessor will first determine the existence of any separate periods of exposure (which I have done) and then make a determination of what proportion to the whole each separate period bears having regard to the number of such periods, the length of each such period and the duration of and intensity of exposure within each period.

Period 1 comprises 2 years.

Period 2 I determine to be 10 years and (rounded) 2 months.

I determine Period to be 15 years and 6 months.

The whole period of exposure is, therefore, 27 years and 8 months.

Therefore, the first period comprises 7% of the whole, the second period is 37% of the whole and the third period is 56% of the whole.

Read overall the Particulars do not enable me to differentiate between periods of exposure having regard to the number of such periods, the length of each such period and the duration of and intensity of exposure within each period.

Clause 5(8) goes on to require that the Contributions Assessor is to treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought apply.

In light of the foregoing I am not satisfied that I should do other than treat each period as making an equal contribution in accordance with the abovementioned proportions.

Finally the Contributions Assessor is to apply the standard presumptions to each separate period of exposure. The standard presumptions are applied according to the Categories of defendants determined pursuant to Clause 5(2) of the Order.

Categories of Defendants

CD asserts that it is a Category 2 defendant. CD denies that it was an installer of asbestos.

There is no precise unanimity as to the assertions by Comcare, GIO or WGL as to the Categories into which CD ought be determined to be.

I am required to assume defendants are liable "solely on the basis of ... the plaintiff's statement of particulars and the defendants' replies on the claim".

In their replies GIO and WGL assert that CD was an installer of asbestos and, as such, ought be classified as a Category 1 defendant. Accordingly, I am required to so assume and I determine CD to be a Category 1 defendant.

As previously said, CD accepts that it is Category 2 defendant. I make that determination.

There is unanimity as to Comcare being determined to be a Category 2 defendant.

GIO and WGL accept that they should each be determined to be a Category 1 defendant.

Index Periods and Standard Presumptions

Period 1 spans Index Period A (all times before 1 January 1961) and Index Period B (between 1 January 1961 and 31 December 1978) with 1 year of exposure occurred in each Index Period. Accordingly, of the 7% of overall liability attaching to Period 1, 3.5% of liability will be apportioned to each Index Period. In Index period A the standard presumptions stipulate the ratio between Category 1 defendants and Category 2 defendants to be 75%:25%.

During Index Period B the standard presumptions provide for apportionment in the ratio of 65% to Category 1 defendants and 35% to category 2 defendants.

Period 2 is wholly in Index Period B.

Period 3 begins in Index period B, spans the whole of Index Period C (between 1 January 1979 and 31 December 1989) and ends in Index Period D (all times after 1 January 1990)

The standard presumptions for Index Period C provide for apportionment in the ratio of 60% to Category 1 defendants and 40% to Category 2 defendants while for Index Period D the standard presumptions provide for apportionment in the ratio of 40% to Category 1 defendants and 60% to category 2 defendants.

Clause 5(3) of the Order provides that:-

"If a defendant, in any particular case, falls within both categories (ie as an installer and employer of the claimant) then separate share is to be calculated by the Contributions Assessor for the role of that defendant which falls within each category."

Accordingly, separate shares will be calculated for CD as installer (Category 1) and employer/occupier (Category 2) in each of the Periods.

Clause 5(4) of the Order provides:-

"If there is more than one defendant in either Category 1 or Category 2, then the Contributions Assessor is to treat each defendant as equal in contribution to the percent share of that Category unless satisfied that a variable contribution ought apply."

Clause 5(5) of the Order deals with the column in Clause 5(1) which is headed "Extent of variation for each category of defendant". The Clause explains the reasoning lying behind the percentages stipulated in each Index Period. It then goes on to provide:-

" ... 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 .. is not to be applied unless the Contributions Assessor is satisfied that it is appropriate to vary the standard presumptions **in the particular**

circumstances of the individual case. ..." I have added the emphasis.

There is a note to Clause 5(5) which, relevantly to this determination says "For example, a case **might** arise where the Contributions Assessor considers that the apportionment between an employer and a supplier should be adjusted because the employer is considered particularly culpable in this particular case. ...". (I have added the emphasis)

It is asserted that the standard presumptions ought be varied upwards in the case of CD as an employer/occupier on the basis of the knowledge of the dangers of asbestos which it did or ought to have had. I am not satisfied that the extent of the knowledge of CD is a matter sufficient to satisfy me that there ought to be a variation of the standard presumptions.

It has also been asserted that the standard presumptions ought be varied against GIO. I am not persuaded that there is any particular circumstance in this individual case which would satisfy me that there ought be a variation of the standard presumptions.

Calculations of Apportionments of Liability

During Period 1 CD is both a Category 1 defendant and a Category 2 defendant while WGL is a Category 1 defendant.

In order to maintain the percentages required for Index Period A (75%:25% as between Category 1 defendants and category 2 defendants), I determine that CD and WGL as Category 1 defendants will each be liable for 42.86% of the 3.5% share attaching to the year of exposure in this Index Period while CD as employer will be liable for 14.28% of the percentage share attaching this period.

Converting those percentages to percentage shares of 3.5%, CD and WGL are liable for 1.5% as category 1 defendants and CD as employer is liable for 0.5%.

Maintaining the percentages required for Index Period B (65%;35% as between Category 1 defendants and category 2 defendants), the category 1 defendants (CD and WGL) will be liable for 39.4% and the Category 2 defendant will be liable for 21.2% of the 3.5% attaching to this period of one year.

This converts to an CD and WGL each being liable for 1.38% with CD being liable for an additional 0.74%.

The defendants liable during Period 2 are GIO and CD which are each Category 1 defendants with CD also a Category 2 defendant. The standard presumptions stipulate a ratio of 65%:35% as between Category 1 defendants and category 2 defendants. Maintaining the ratio required, each Category 1 defendant will be liable for 39.4% with the Category 2 defendant liable for 21.2% of the 37% of liability attaching to Period 2.

Accordingly I apportion to each of GIO and CD as Category 1 defendants $[37 \times 0.394]$ 14.58% with CD being liable for 7.84%.

Period 3 spans 15 years and 6 months.

From 1 July 1976 to 31 December 1978 (2 years and 6 months; 30 months; "Period 3.1") is in Index Period B. The period between 1 January 1979 to 31 December 1989 (11 whole years; 132 months; "Period 3.2") is in Index Period C with the remaining period from 1 January 1990 to 31 December 1991 (2 whole years; 24 months; "Period 3.3") is in Index Period D.

I determine that liability for Period 3.1 is $[30/186 \times 56]$ 9%, for Period 3.2 $[132/186 \times 56]$ 40% and for Period 3.3 $[24/186 \times 56]$ 7%.

During the Period 3 CD is a Category 1 defendant and also a Category 2 defendant and Comcare is a Category 2 defendant.

The ratio between Category 1 and Category 2 defendants during each of these three periods is respectively 65:35, 60:40 and 40:60.

Therefore, and maintaining the stipulated ratios:-

In Period 3.1 CD will be liable for 4.34% as the Category 1 defendant while CD and Comcare will each be liable for 2.33% as category 2 defendants.

In Period 3.2 CD will be liable for 17.14% as the Category 1 defendant while CD and Comcare will each be liable for 11.43% as Category 2 defendants.

In Period 3.3 CD will be liable for 1.74% as the Category 1 defendant while CD and Comcare will each be liable for 2.63% as Category 2 defendants.

In the forgoing calculations there has been some necessary rounding.

Conclusion

CD is determined to be 66.15% liable.

WGL is determined to be 2.88% liable.

Comcare is determined to be 16.39% liable.

GIO is determined to be 14.58% liable.

I appoint CD as Single Claims Manager.

Dated 29th November 2011

Peter O' Connor
Contributions Assessor