

**DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

No 114 of 2010/1

**JOHN GOWAN
Plaintiff**

**AMACA PTY LIMITED
First Defendant
& Cross Claimant**

**AUSTIN RICHARDS PTY LTD
Second Defendant**

**THE STATE OF NEW SOUTH WALES
First Cross Defendant**

**NEW SOUTH WALES LAND
AND HOUSING CORPORATION
Second Cross Defendant**

CONTRIBUTIONS ASSESSMENT

Preamble

The plaintiff, John Gowan, sues the first defendant, Amaca Pty Limited (formerly James Hardie & Coy Pty Limited) ("Amaca") and his former employer, the second defendant, Austin Richards Pty Ltd ("AR"), seeking damages for personal injuries as a result of exposure to asbestos as more fully discussed later.

There has been no Appearance nor Reply filed by AR. I note that *QBE Insurance (Australia) Ltd v CSR Limited* [2009] NSWDDT 7 was concerned with an asbestos related claim for damages brought by a Mr Gibson who had been employed by AR between 1962 and 1970. Those proceedings were taken against QBE Insurance (Australia) Limited pursuant to section 6(4) of the *Law Reform (Miscellaneous Proceedings) Act 1946*.

Amaca has issued a cross claim against The State of New South Wales ("the State"), the first cross defendant, and New South Wales Land & Housing Corporation ("LAH"), the second cross defendant.

The plaintiff alleges that as a result of his exposure to

asbestos he contracted asbestosis which is the medical condition alleged in the Plaintiff's Statement of Particulars ("the Particulars").

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 Acting 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 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". 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 exposure to asbestos

The plaintiff came to Australia in 1952. Prior to coming here he had been exposed to asbestos in circumstances not relevant

to these proceedings.

The Particulars state that, commencing in late 1955, the plaintiff was employed by the New South Wales Department Public Works for about 12 months (which shall hereinafter be called "Period 1"). Most of his work was roof plumbing during which occasionally (two or three days a month on average) he used products for which Amaca is alleged to be liable. On these products he used a handsaw following which he saw some dust in the air and on him from these products. He goes on to say that some dust was given off removing old rooves but much more dust was given off when sawing.

If one averages the 2-3 days per month of exposure to asbestos over a 12 month period, the resultant period of exposure is [2.5 days x 12 months] 30 days.

The next period of exposure ("Period 2") was for about 18 months commencing in about 1956 during which, at variance with the allegation in the Statement of Claim, the Particulars allege the plaintiff was employed by a plumber whose name he cannot remember. That plumber did work for the Housing Commission of NSW. The Reply to Cross Claim filed by LAH confirms that the Housing Commission of NSW was the predecessor of LAH and that the plaintiff's solicitors confirm that, as to employment during Period 2, the allegation in the Particulars is correct.

In any event, LAH is a cross-defendant which I am required to assume is liable and this Determination proceeds on that assumption.

During Period 2 the plaintiff worked next to carpenters using fibro cutters and hand saws to cut and shape asbestos products for which Amaca is alleged to be liable. There was dust in the air which he inhaled. The plaintiff himself also cut Amaca products and this gave off dust which he inhaled. His exposure to asbestos during Period 2 was "on about one day a week on average ..."

Exposure of one day per week for a period of 18 months (78 weeks) amounts to exposure over a period of 78 days.

During a period ("Period 3") between 1958 and 1967 (9 years) the plaintiff was employed by AR. He says he was heavily exposed to asbestos dust and fibre during his work with AR. He says he worked directly with asbestos insulation materials on about two to three days per week on average and on a further

two to three days per week on average he worked in the vicinity of carpenters using asbestos cement. He identifies the asbestos materials used by him and by the carpenters as being asbestos materials for which Amaca is alleged to be liable. He goes on to describe the work done by him and others in some detail. He concludes by describing the work done by him in the employment of AR as being "the dustiest work I have ever performed".

The inference I draw from his description is that, assuming as I do that he worked five days per week, he was exposed to asbestos on every working day over a period of 9 years amounting to (9 years x 50 weeks [assuming 2 weeks annual leave] x 5 days) 2,250 days.

In 1967 of the plaintiff went into business as a plumber and gas fitter on his own account. In 1974 he went into business with another person but that fact is not relevant to this determination.

He was not exposed to asbestos until about 1969. Thereafter, "until the mid-1970's" he worked directly with asbestos products for which Amaca is alleged to be liable. There were large amounts of asbestos dust in the air and all over him and the work was very dusty. He could not help but inhale the dust created by his work and the work of others around him. This exposure occurred "two or three days per week on average from about 1969 to about 1974". After 1974 he ceased using asbestos based products and began using fibreglass based products.

The Particulars and go on to say "In addition to my exposure to asbestos from the installation materials I have described above, throughout my work in self-employment from 1967 to 1984 I was regularly (at least two days per week on average) exposed to an and inhaled asbestos dust from the work of carpenters using asbestos containing materials on the construction sites upon which I worked". He goes on to identify those last mentioned product's those being products for which Amaca is alleged to be liable.

Earlier in the Particulars it is said that prior to 1969 he did residential plumbing work during the course of which he was not in contact with asbestos or asbestos products. I infer from this that where the year "1967" appears in the passage quoted in the previous paragraph, I should treat that as "1969"; that is to say the quoted passage should be read as referring to his exposure between 1969 and 1984.

The Particulars go on to mention exposure to asbestos while using an angle grinder in the course of his self-employment. I do not understand this to be by way of expansion of the previously described exposure.

The result of the foregoing descriptions of exposure to asbestos during the period of his self employment is that between 1969 and 1974 (which will hereinafter be called "Period 4"), he was exposed both as a result of his own work with asbestos products (2 or 3 days per week) and as a result of exposure caused by the work of those around him (at least 2 days per week on average). Between 1974 and 1984 ("Period 5") he was exposed to asbestos caused by the activities of those around him being "at least 2 days per week on average".

The exposure during Period 4 therefore amounts to exposure of (I infer) 5 days per week while the exposure during Period 5 amounts to exposure of (I infer) 2 days per week.

Period 4 covers 5 years (1969-1974) amounting to exposure for (5 years x 50 weeks [allowing for leave] x 5 days) 1250 days while Period 5 covers 10 years (1974-1984) being (10 years x 50 weeks x 2 days) 1000 days.

In total, therefore, I determine that the plaintiff was exposed to asbestos for an overall period of 4,608 days between 1955 and 1984.

As percentages of the overall period of exposure Period 1 is 0.65%, Period 2 is 1.69%, Period 3 is 48.83%, Period 4 is 27.13% and Period 5 is 21.7%. Needless to say there is a degree of rounding in these calculations.

There is a necessary element of guesstimation in these calculations such that it does not seem to me to be possible to make any further meaningful adjustments to accommodate possible variations to reflect different views as to duration and/or intensity of the various exposures to asbestos.

Replies by Defendant and Cross Defendants

LAH is a cross defendant alleged to be liable during Period 2 in respect of work done at Narraweena. In its Reply LAH asserts that it did not undertake any work at Narraweena at the relevant time. Notwithstanding this assertion I am required to assume that LAH is liable.

By common agreement Amaca is a Category 1 defendant and AR is a Category 2 defendant.

LAH asserts that the State and LAH are Category 1 defendants.

Amaca asserts that the Standard Presumptions ought be varied to the maximum allowable extent against the State and LAH.

The State asserts that the Standard Presumptions ought be varied to the maximum allowable extent in its favour in respect of the liability alleged against it.

The Replies, necessarily, do not address such matters as frequency, intensity and/or duration of the plaintiff's exposure to asbestos.

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 (which I have also done).

The clause 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. I have determined the weighting of contribution which ought apply to each period.

Finally the Contributions Assessor is to apply the standard presumptions to each separate period of exposure which will now be done.

Categories of Defendants

Amaca is, non-controversially, determined to be a Category 1 defendant.

The plaintiff's brief description of his work while in the employ of the State satisfies me that the State was an "installer" of asbestos and, as such is a Category 1 defendant as well as being, in its capacity as the plaintiff's employer, a Category 2 defendant.

By virtue of the requirements of clause 5(3) of the Order where a defendant falls within both categories then a separate share is to be calculated for the role of that defendant which falls within each category.

The status of LAH is not easy or clear. It was apparently not the employer of the plaintiff and it asserts that it was neither the occupier nor controller of the premises where the plaintiff alleges he worked during Period 2. As a Contributions Assessor I required to assume that LAH is liable. In applying that requirement to the determination of into which category of defendant LAH falls I determine it to be a Category 2 defendant in the circumstances of these proceedings.

Index Periods and Standard Presumptions

Period 1 is the period during which the plaintiff was employed by the State and in the course of his employment he was exposed to asbestos for which Amaca is alleged to be liable.

Period 1 falls in Index Period A during which the standard presumptions apportion liability between Category 1 and Category 2 defendants in the ratio of 75%:25%.

As an employer the State was both large and sophisticated. I am satisfied that the standard presumptions ought be varied to the maximum permissible extent so that as between categories of defendants the ratio is varied to 55%:45% for Period 1 during which Amaca and the State are Category 1 defendants with the State also being a Category 2 defendant.

Period 2 also falls within Index Period A. During Period 2 Amaca is a Category 1 defendant and LAH a Category 2 defendant. I am not satisfied that the standard presumptions ought be varied during Period 2.

Period 3 begins in 1958 and ends in 1967 being 9 years.

Index Period A ended before 1 January 1961 when Index Period B commenced. During Index Period B the standard presumptions apportion liability as between categories of defendants in the ratio of 65%:35%.

I am not satisfied that the standard presumptions ought be varied during Period 3 during which Amaca is a Category 1 defendant and AR is a Category 2 defendant.

After the expiration of Period 3 Amaca is the sole defendant.

Calculations of Apportionments of Liability

During Period 1, there are two Category 1 defendants and one Category 2 defendant with liability to be apportioned between them in the ratio of 55%:45% respectively. It is my opinion that this means that as between each defendant in Category 1 and the Category 2 defendant the ratio of 55:45 is to be preserved.

Accordingly of the 0.065% attaching to Period 1, I apportion 0.23% to each Category 1 defendant and 0.19% to the Category 2 defendant; ie Amaca 0.23% and the State $[0.23 + 0.19]$ 0.42%.

During Period 2 (to which period is attached 1.69% of overall liability) I apportion $[75\% \text{ of } 1.69\%]$ 1.27% to Amaca and 0.42% to LAH.

Period 3 attracts 48.83% of overall liability and spans Index Period A and Index Period B. Of the total period of 9 years comprising Period 3, the first 3 years (1958-1960 inclusive) is in Index Period A with the remaining 6 years being in Index Period B. Therefore, one third of the liability for the early part of Period 3 $[48.83/3]$ is 16.28% (this period hereinafter called "Period 3a") with the remainder of liability for Period 3 being 32.55% (with this remainder period hereinafter called "Period 3b").

Applying the standard presumptions (75%:25%) between Amaca and AR during Period 3a, I apportion liability as to $[75\% \times 16.28]$ 12.21% to Amaca and $[25\% \times 16.28]$ 4.07% to AR.

During Period 3b, the standard presumptions (65%:35%) result in liability of $[65\% \times 32.55]$ 21.16% being apportioned to Amaca and $[35\% \times 32.55]$ 11.39% apportioned to AR.

Amaca is the only defendant sued in respect of Periods 4 and 5 to which have been apportioned 27.13% and 21.7% respectively.

Conclusion

Amaca is determined to be [0.23 + 1.27 + 12.21 + 21.16 + 27.13 + 21.7] **83.7%** liable, **AR** [4.07 + 11.39] **15.46%** liable, **the State 0.42%** liable and **LAH 0.42% liable**.

I appoint Amaca as Single Claims Manager.

Dated 22nd September 2010

Peter O'Connor
Contributions Assessor