

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

DDT No. 329 of 2009

BETWEEN

ALAN ROBSON GRIFFITHS
Plaintiff

STATE OF NEW SOUTH WALES
Defendant / Cross-Claimant

AMACA PTY LIMITED
First Cross-Defendant

WALLABY GRIP PTY LIMITED
Second Cross-Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* ("the Regulations") for a determination of apportionment as between the Defendants.
2. Regulation 47(1) provides: "A reference in this Division to a defendant includes a reference to a cross-defendant".
3. Regulation 49 of the Regulations requires that I have regard only to the Statement of Particulars provided by the Plaintiff any replies filed by the Defendants/Cross-Defendants and not to any other document.
4. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standards Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.

5. In the present matter, Alan Robson Griffiths (hereinafter referred to as "the Plaintiff") brought proceedings in the Dust Diseases Tribunal on 3 November 2009 by means of a Statement of Claim nominating the State of New South Wales (hereafter referred to as "the Railways") claiming damages for a mesothelioma condition.
6. It can be seen from the nature of the Plaintiff's allegations that the Plaintiff's condition is indivisible.
7. By his Statement of Claim the Plaintiff alleged that between 1943 and 1958 he was employed by the Railways as an apprentice fitter and machinist and thereafter as a fitter and machinist and in the course of such employment, whilst working at Chullora, Everleigh and Enfield Workshop, he was exposed to asbestos dust and fibre.
8. On 22 December 2009 the Plaintiff provided a statement of particulars which, insofar as is relevant alleged as follows:
 - (a) That his only period of exposure to asbestos was while working for the Railways
 - (b) Between 1943 and 1948 the Plaintiff undertook an apprenticeship and during this time rotated through the workshops.
 - (c) While working at Chullora the Plaintiff described the atmosphere as very dusty, although when he first started working at the workshop he was not exposed to asbestos.
 - (d) From 1958, while working at Chullora, the Plaintiff was exposed to asbestos, which had come from Hardie-Ferodo brake shoes, and the Plaintiff was exposed to asbestos dust and fibre given off from the brake shoes.
 - (e) The work at Chullora involved total refurbishment and overhaul of steam locomotives and many parts of the locomotives were insulated with asbestos material; the boilers were insulated with asbestos blankets or asbestos slurry, the pipes from the boilers were lagged with asbestos rope; flange gaskets on the steam pipes were made from asbestos with valve and gland packing also made from asbestos.
 - (f) The Plaintiff's work involved stripping, repairing, replacing the valves, gauges, pistons, tubing and this involved contact with asbestos bricks, sheeting, asbestos rope, and at times gland packing.

- (g) The Plaintiff's exposure at the Locomotive and Boiler Shops particularly involved removing and applying asbestos insulation, which was carried out by the Plaintiff and also in the vicinity of other workers performing the same work.
 - (h) The Plaintiff used "blue asbestos" coming in a screw top container.
 - (i) The Plaintiff performed work in the pits with work on locomotives being performed above him.
 - (j) The air in the locomotive and boiler workshops was always very dusty.
 - (k) After 1948 the Plaintiff continued to work for the Railways until he left in 1958.
 - (l) While working as an apprentice the Plaintiff engaged in snowball fights on regular occasions.
9. It can be seen from the above that the whole of the Plaintiff's exposure to asbestos occurred before 1 January 1961 and thus falls within period A. According to the Standard Presumptions Order this means that a Category 1 defendant would be responsible for 75% with a Category 2 defendant being responsible for 25% but subject to an increase or decrease of up to 20 percentage points.
10. On 12 January 2010, the Railways issued a Cross-Claim against Amaca Pty Ltd (hereafter referred to as "Amaca") and Wallaby Grip Limited (hereafter referred to as "WGL"). The Cross-Claim was brought under the provisions of the *Law Reform (Miscellaneous Provisions) Act 1946* and additionally for a breach of warranty.
11. On 19 January 2010 the Railways provided a Reply which, so far as relevant, alleged the following:
- (a) The Railways should be a Category 2 Defendant with Amaca and WGL each Category 1 Defendants
 - (b) The Railways is not a Category 1 Defendant, in that it does not come within the terms of clause 5(2)(a) of the Standard Presumptions Order by reason of the fact that it was not a business and did not "engage" with another person to install plant and did not engage in a business within the meaning of clause 5(2)(a).
 - (c) If the Railways is only a Category 2 Defendant, then there should be no variation of the Standard Presumptions but if it is a Category 1 Defendant as well then there should be a variation.

12. On 22 January 2010 WGL provided a Reply which, so far as relevant, alleges the following:
- (a) WGL admits that between 1944 and 1958 it was one of a number of suppliers generally of asbestos rope, but it does not admit that it supplied asbestos rope to the Railways.
 - (b) WGL denies that it manufactured and/or supplied asbestos sheeting.
 - (c) WGL denies that it manufactured asbestos blocks.
 - (d) At times WGL supplied asbestos blocks, which had been manufactured by Amaca.
 - (e) WGL denies that it manufactured millboard but it one of a number of suppliers generally of millboard and does not admit that it supplied millboard to the Railways.
 - (f) WGL admits that during the period 19 December 1949 and 1956 it was one of a number of manufacturers and suppliers generally of certain types of asbestos composition.
 - (g) WGL denies that it manufactured flange gaskets but admits that between 1943 and 1958 it was one of a number of suppliers generally of flange gaskets.
 - (h) WGL denies manufacturer of valve and gland packing but admits that it was one of a number of suppliers generally of valve and gland packing.
 - (i) WGL denies that it manufactured and/or supplied brake shoes.
 - (j) Amaca, WGL and the State should all be placed in Category 1 and the Railways should also be placed in Category 2.
 - (k) Based on the Railways' knowledge, the Standard Presumptions should be varied by 20 percentage points against the Railways. This also should take place by reason of the size and sophistication of the Railways.

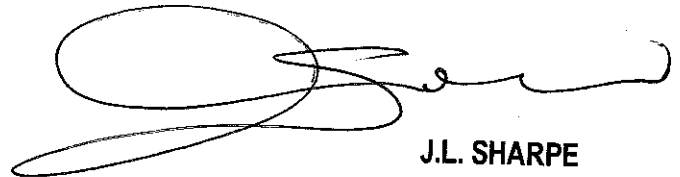
13. Amaca provided a Reply which so far as is relevant provided:
- (i) Admits to manufacturing asbestos millboard;
 - (ii) It was not until 1961 that Amaca provided brakes, and Hardie-Ferodo did not commence to operate in NSW until 1962;
 - (iii) The Railways should be placed into Category 1 & Category 2, Amaca and WGL should be placed in Category 1;

14. Initially the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole each separate period bears having regard to the number of such periods, the length of each period, the duration of and intensity of exposure to asbestos present in each such period.

15. In the present case, the only period of exposure is that as alleged by the Plaintiff while employed by the Railways and the intensity of the exposure is present during the whole of such period.
16. Notwithstanding submissions made by the Railways, I determine, on the basis of the material before me, that the Railways falls into both Category 1 and Category 2. The Railways comes within the terms "corporations, authorities and legal entities" and while the terms "business" is used, it clearly encompasses the Railways' operations.
17. I determine that the Railways, Amaca and WGL each fall into Category 1 and that additionally, the Railways falls into Category 2.
18. Insofar as Category 1 Defendants are concerned, the liability should be divided equally. I note the assertions made by both Amaca and WGL but on the material before me, and in particular the matters stated by the Plaintiff, I have determined that the liability be divided equally.
19. The question then arises as to the contribution between Category 1 and Category 2 Defendants, which are, according to the Standard Presumptions Order, to be on the basis of 75% as against 25%.
20. In the present case, the Standard Presumptions take into account the various aspects of the liability of the Railways and Amaca and WGL, and accordingly there should be no variation to the Standard Presumptions.
21. Thus, the following calculations as to liability can be made:
 - (a) The Railways bears one third of the 75% liability as a Category 1 defendant, plus 25% as a Category 2 defendant.
 - (b) Amaca is liable for one third of the 75% liability as a Category 1 defendant.
 - (c) WGL is liable for one third of the 75% liability as a Category 1 defendant.
22. Therefore I determine the total liability to the Defendant and the Cross-Defendants as follows:

The Railways	50%
Amaca	25%
Wallaby Grip	25%
Total	100%

23. Pursuant to clause 61 of the Regulations, I appoint the Railways as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE

28 January 2010