

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 8258/2008 & 8258/2008 CC1

Kelvin Blake Hutcheson

Plaintiff

Eraring Energy

Defendant/Cross Claimant

Tubemakers of Australia Pty Limited

First Cross Defendant

Amaca Pty Ltd

Second Cross Defendant

Babcock International Limited

Third Cross Defendant

DETERMINATION

INTRODUCTION

By letter dated 12 November 2008 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings. I am required to produce my Determination by 4.00 pm on 21 November 2008.

I have been provided with the file of the Dust Diseases Tribunal that contains the following material upon which I rely in making this determination:

1. Plaintiff's Statement of Particulars ("Particulars")
2. Defendant's Reply
3. First Cross Defendant's Reply
4. Second Cross Defendant's Reply
5. Third Cross Defendant's Reply

In addition to the material described at 1-5 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

I am obliged to assume that each defendant, and this includes the cross defendants, are liable to contribute and I stress this point.

I refer to the defendants as:

- Defendant – Eraring
- First Cross Defendant- Tubemakers
- Second Cross Defendant- Amaca
- Third Cross Defendant – BIL

Eraring is a Category 2 Defendant – I note BIL’s submission in this respect. Each other Defendant is a Category 1 Defendant and Tubemakers is also a Category 2 Defendant.

PLAINTIFF’S ALLEGATIONS OF EXPOSURE

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the plaintiff’s respiratory system of asbestos dust and fibre.

The plaintiff alleges he was employed by Tubemakers from 1945 to 1951 as a cadet engineer. He worked at Bunnerong Power Station (“Bunnerong”) in dusty conditions assisting in the installation of and reporting on the installation of a turbo alternator. He was exposed on a daily basis from 3 April 1945 until December 1945 and on a number of occasions in 1946.

The plaintiff further alleges he was exposed to Amaca products in 1964 while constructing a carport (“carport exposure”). He says however that this exposure was insignificant when compared to his exposure at Bunnerong.

CONTRIBUTION ASSESSMENT

The Reply filed by Eraring makes the following submissions:

- Eraring contracted to organisations with expertise that in truth controlled Bunnerong.
- Bunnerong was administered by a Local Council which in turn was occupied by Aldermen
- Eraring had only constructive knowledge at relevant times
- Eraring was an agent of the Crown not part of the Crown
- Hardies is the most culpable
- There are two periods of exposure, Bunnerong which should be 95% liable and the Carport exposure which should be 5% liable- and for which Amaca is solely liable
- Contribution for Bunnerong should be apportioned 75% to Category 1 Defendants and 25% to Category 2 Defendants.
- The Category 1 Defendant liability should be equally shared between BIL, Amaca and Tubemakers
- Tubemakers Category 1 liability should be increased by 10% and BIL's reduced by 10% because the plaintiff did not specifically work on BIL plant and equipment
- The Category 2 liability should be shared equally between Tubemakers and Eraring, 12.5% each
- Tubemakers Category 2 liability should be increased to 15% and Eraring reduced to 10%

The Eraring submissions are eminently sensible and take a practical and realistic approach to the contribution exercise, given the constraints imposed by the limited evidence upon which I am permitted to rely and the Standard Presumptions.

The Reply filed by Amaca submits that it should be seen as an “innocent defendant”. The other Defendants do not agree with this proposition. Amaca submits that the Category 1 liability should not be apportioned equally between BIL, itself and Tubemakers for a series of reasons that relate to an argument that the plaintiff was not exposed to Amaca products.

BIL submits that it cannot be liable but I am not permitted to accept this submission. As to contribution it makes the following submissions:

- Eraring should be both a Category 1 and Category 2 Defendant based on evidence that it made the services of four fitters available at Bunnerong and that therefore it was an installer of the turbo alternator.
- Eraring was wilfully blind to the dangers of exposure in view of material available from Government Departments and in view of the general state of knowledge of the State of NSW
- Eraring could and should have taken care to avoid harm to workers at Bunnerong
- The facts of a well known case of *Royal* are distinct from this case
- Regard should be had to the size and sophistication of Amaca in determining culpability
- Tubemakers was the plaintiff’s employer and had control of his work practices at Bunnerong

- There are two periods of exposure, Bunnerong which should be 95% liable and the carport exposure which should be 5% liable- and for which Amaca is solely liable

I do not accept that Eraring should be a Category 1 Defendant as well as a Category 2 Defendant. The Standard Presumptions refer to engagement in a business and I think it is tolerably clear that at relevant times Eraring was not engaging in a business.

Tubemakers' reply makes the following submissions:

- Eraring provides no evidence supporting its claim for contribution against Tubemakers
- Tubemakers should be a Category 2 Defendant only on the grounds that there is no evidence that it is properly a Category 1 Defendant
- "City County Council officers" were equipped with knowledge in relation to generation of electricity prior to commissioning the construction of Bunnerong
- There are two periods of exposure, Bunnerong which should be 95% liable and the carport exposure which should be 5% liable- and for which Amaca is solely liable
- The Standard Presumptions should not be varied as between Category 1 and Category 2 Defendants
- The Standard Presumptions should not be varied as between the Category 1 Defendants
- The Standard Presumptions should not be varied as between the Category 2 Defendants

Dealing firstly with the carport exposure I am not satisfied that a differential determination of the contribution of this exposure period ought to be made because of the description applied to it by the plaintiff and because it was indeed likely to have been very light compared to exposure at Bunnerong. Increased risk of contracting mesothelioma from exposure should not be confused with just and equitable apportionment.

I am satisfied that the approach to contribution adopted by Eraring is by and large the proper approach. It takes account of the Standard Presumptions and the limited nature of the material upon which I am permitted to rely. Save for the suggestion that the carport exposure is liable to contribute I accept the Eraring submissions on calculation of contribution. I believe that the result that it produces is reflective of a just and equitable apportionment of liability.

Accordingly I determine contribution to be:

- BIL – 15%
- Eraring – 10%
- Tubemakers – 50%
- Amaca – 25%

I appoint Tubemakers as the primary defendant to be the Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred

Date: 20 November 2008