

**CONTRIBUTIONS ASSESSMENT**

**DUST DISEASES TRIBUNAL**

**MATTER NO: 265/2009 & 265/2009/CC1**

**Alexander Macdonald**

**Plaintiff**

**Amaca Pty Ltd**

**First Defendant/Cross Claimant**

**Wallaby Grip (BAE) Pty Ltd**

**Second Defendant**

**Bluescope Steel (AIS) Pty Ltd**

**Third Defendant**

**CSR Limited**

**Cross Defendant**

## **DETERMINATION**

### **INTRODUCTION**

By letter dated 9 March 2010 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

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. First Defendant's Reply
3. Second Defendant's Reply
4. Third Defendant's Reply
5. 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 assume that each defendant sued by the Plaintiff and in addition the Cross Defendant is liable to the Plaintiff. The Plaintiff is a 71 year old male who has allegedly contracted asbestos related pleural disease and asbestosis.

I will refer to the Defendants as Amaca, BAE, Bluescope and CSR.

There is no dispute that Amaca, BAE, and CSR are Category 1 defendants. There is no dispute that Bluescope as occupier of the Port Kembla steelworks is properly categorised as a Category 2 Defendant. There is a dispute as to whether Bluescope should additionally be categorised as a Category 1 Defendant on the grounds that it is an installer of asbestos products.

I have previously dealt with this same issue in a Determination of Wilfred Went 7023/2007. In that determination I dealt with the issue in the following way;

**“Category 1 defendants are described in Clause 5(2)(a) of the Standard Presumptions thus:**

***“Category 1 which includes all those corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Miners, Manufacturers, Suppliers and/or Installers of asbestos or of products, plant and equipment which contained asbestos”***

**The first question is “Did Bluescope install asbestos?”**

**The submissions by BAE are helpful. They provide a copy of a statement of Ronald Thomas Hillard (“Mr Hillard”) dated 28 April 2004. Mr Hillard was employed by Bluescope from 1958 to 1982 at its Port Kembla steelworks. Mr Hillard’s statement describes a significant operation of installation of asbestos at the Port Kembla steelworks**

**undertaken by Bluescope employees. At one stage, Mr Hillard states, there were 580 people working in the department that dealt with laying asbestos bricks as insulation.**

**On the basis of Mr Hillard's statement I am satisfied that Bluescope installed asbestos.**

**Is Bluescope also properly categorised as a Category 1 defendant? It seems to me that central to determination of this question is a consideration of whether Bluescope engaged in a business of installation. The decided cases dealing with whether an entity or individual is engaged in a business arise from disputes with revenue authorities but nevertheless provide invaluable guidance as to how the law determines whether a business exists.**

**Four relevant points emerge from the cases as being indicative of the carrying on of a business:**

- 1. The presence of a profit motive**
- 2. The size and scale of activity exceeding that required for domestic needs**
- 3. The activity or conduct having an element of continuity as opposed to acts or conduct in isolation**
- 4. Systematic and ordered activity.**

**I believe that each of the above four indicia are satisfied in examining Bluescope's installation of asbestos.**

**Certainly it could not be said that Bluescope contracted with any third parties to install asbestos, not could it be said that the primary or core business of Bluescope was installation of asbestos. Notwithstanding Bluescope was obviously engaged in the business of installation of asbestos. This installation was a major part of Bluescope's operations. I am satisfied that without the installation of asbestos, the efficiency of Bluescope's operation and therefore its profitability would have suffered. In this sense the installation of asbestos was a fundamental aspect of Bluescope's business. Bluescope should therefore be categorised as a Category 1 defendant as well as a Category 2 defendant."**

In its Reply Bluescope refers to a determination of Paul Blacket SC in which he rules that Bluescope is not to be regarded as a Category 1 Defendant. BAE, in its Reply refers to a determination of David Jay in which he rules that Bluescope is to be regarded as a Category 1 Defendant. What this demonstrates is that the relevant provisions of the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 are sufficiently broad such that they are capable of differing interpretation. Until a Judge of the Tribunal rules on the issue I consider that the interpretation of the relevant provisions of the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 that I have previously applied is correct. I therefore rule that Bluescope is both a Category 1 and 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 two separate periods of exposure.

He says that from 1969 to 1974 he worked for a number of employers at the Port Kembla steelworks as a refractory brickmaker. He says that this period accounts for 90% of his total exposure. He was exposed while working with millboard, asbestos powder, pipe sections, asbestos rope, and asbestos blocks that he alleges were manufactured by Amaca and BAE.

From 1974 to 1982 he worked for Simon Carves in various places and was exposed while working with asbestos paper.

## **CONTRIBUTION ASSESSMENT**

The second period in time is easily dealt with. BAE is responsible for this period given that it admits manufacturer of asbestos paper.

The first period is not so easily dealt with.. The standard presumptions require apportionment between the Category 1 and Category 2 Defendants of 65% -35%. Because of the matters set out by Kearns J in (Re Floro) Bluescope v Amaca I consider that it is appropriate to increase the liability to contribute of Bluescope as a Category 2 Defendant to 50%.

Of the Category 1 Defendant liability I consider that Amaca should bear a greater share than BAE and Bluescope because Amaca admits manufacture of millboard, asbestos powder, pipe sections, and asbestos blocks while BAE admits manufacture of asbestos rope only. I consider

that Amaca should be liable to contribute 50% of the Category 1 liability for this period, and Bluescope and BAE 25% each.

CSR should be liable for 50% of the Amaca liability.

On the above analysis contribution would be BAE - 21.25%, CSR – 11.25%, Amaca – 11.25%, and Bluescope – 56.25%

The above figures do not to my mind reflect a just and equitable outcome in that too great a percentage of liability is apportioned to Bluescope. I therefore round the Bluescope figure down to 50% and increase the Amaca, CSR and BAE figures up by 2%, 2% and 2.25% respectively. I determine contribution to be:

- Amaca – 13.25%
- CSR – 13.25%
- BAE – 23.5%
- Bluescope – 50%

I am required by Clause 61 of the Dust Diseases Tribunal Regulation 2007 to appoint Bluescope as Single Claims Manager

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

Toby Tancred

Date: 18 March 2010