

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

DDT No. 13/2010

BETWEEN: **ALMA MURIEL MANNIX AS ADMINISTRATOR *AD LITEM* OF THE ESTATE OF THE LATE LEON ERNEST MANNIX**
Plaintiff

AND: **BOVIS LEND LEASE PTY LIMITED**
First Defendant

AND: **AMACA PTY LIMITED**
Second Defendant

BETWEEN: **AMACA PTY LIMITED**
First Cross-Claimant

AND: **CSR LIMITED**
First Cross-Defendant

AND: **WALLABY GRIP LIMITED**
Second Cross-Defendant

AND: **WALLABY GRIP (BAE) PTY LIMITED**
Third Cross-Defendant

BETWEEN: **BOVIS LEND LEASE PTY LIMITED**
Second Cross-Claimant

AND: **AMACA PTY LIMITED**
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 and Cross-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 provides, so far as is relevant, that the determination of contributions that each Defendant and Cross-Defendant is liable to make is to be made on the assumption that the Defendants and the Cross-Defendants are liable, and solely on the basis of the Plaintiff's Statement of Particulars and the Defendants' Replies and the Cross-Defendants' Replies, together with an application of the Standard Presumptions which operate by reason of the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order"). The Standard Presumptions operate in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order, which provides both periods as to exposure and the relevant categories into which a defendant might fall, subject to any apportionment being increased or decreased by up to 20 percentage points.
4. In the present case, Leon Ernest Mannix (hereinafter referred to as "the Deceased") issued proceedings by means of a Statement of Claim on 21 January 2010 claiming that from about 1965 to about 1993 the Deceased was employed by the First Defendant as a carpenter leading hand foreman and general foreman and that in the course of his employment he was exposed to asbestos dust and fibre as a result of his coming into contact with various asbestos-containing insulation building products, and such asbestos products were manufactured and/or supplied by Amaca Pty Ltd (hereinafter referred to as "Amaca").
5. The Deceased alleged that he was suffering from a mesothelioma, which, of course, is an indivisible condition.
6. The Deceased died in February 2010.
7. On 19 April 2010 an Amended Statement of Claim was filed which Statement of Claim substituted the Plaintiff for the Deceased.

8. On 12 February 2010 Amaca issued a cross-claim against CSR Ltd (hereinafter referred to as "CSR"), Wallaby Grip Ltd (hereinafter referred to as "WGL") and Wallaby Grip (BAE) Pty Ltd (hereinafter referred to as "BAE") claiming as against CSR liability pursuant to a Deed of Agreement or, alternatively, by reason of the *Law Reform (Miscellaneous Provisions) Act 1946* and, as against WGL and BAE, by reason of the provisions of the *Law Reform (Miscellaneous Provisions) Act 1946*.
9. On 21 April 2010 Bovis issued a Second Cross-Claim against Amaca seeking contribution under the *Law Reform (Miscellaneous Provisions) Act 1946*. On 25 May 2010, Bovis discontinued the Second Cross-Claim.
10. On 19 April 2010 the Plaintiff filed a Statement of Particulars which relevantly alleged:
 - (i) From about 1958 to 1965 the Deceased worked for various building companies and was exposed to asbestos dust and fibre, mainly from the use of asbestos cement flat sheets and, in particular, the Deceased made extensive use of Amaca's compressed AC thick sheet which came onto the market in about 1960.
 - (ii) On 7 September 1965 the Deceased commenced with Bovis and continued working for them until 1993. The Deceased started as a leading hand carpenter, and made a foreman and then a general foreman.
 - (iii) The Deceased's work included being present when fire doors were being installed and when sanded or installed, clouds of dust were given off.
 - (iv) While performing his duties, asbestos fire protection spray was applied by workers and the Plaintiff was exposed to such asbestos dust and fibre emanating from the spraying operation.
 - (v) The Deceased was exposed to and inhaled asbestos on most jobs upon which he worked until the mid-1980s when he was transferred to the interiors/fit-out

division. Until that time, the Deceased's exposure to asbestos continued on a regular basis.

- (vi) On regular occasions in the course of his employment for Bovis in the '60s, '70s and up to the mid-80s the deceased worked alongside carpenters who were cutting Amaca compressed AC thick sheet which work he also did himself. The compressed thick sheets were used for formwork and also as petitions. When this work was performed, clouds of dust entered the air.
 - (vii) In plant rooms of various buildings in which the Deceased worked, he worked within a few feet and at times directly underneath the ladders using asbestos materials to insulate pipes, valves and air-conditioning ducting. The ladders used a handsaw to cut through the greyish white pipe sections, and this created clouds of dust all around the Deceased. When the two halves of a pipe section were placed together over the pipes, a tape or rope which was greyish white and fibrous was then placed around the pipe sections to keep the pipe sections in place. The ladders mixed asbestos composition with water in buckets to make a slurry which they then applied with their hands to the bends in steam pipes and air-conditioning ducting. The work created a lot of dust. By the end of the 1970s, the ladders stopped using half pipe sections.
 - (viii) In the 1980s, the Deceased was exposed to asbestos when he removed tiles from false ceilings in order to gain access to the ceiling space, and a lot of the buildings had asbestos sprayed on the ceilings, and when disturbed in removing the tiles, the Deceased breathed in the dust.
11. On 25 May 2010 Amaca filed a Reply which relevantly alleges:
- (i) The use of the expression "asbestos lagging", "asbestos flat sheet", "asbestos composition" are generic product descriptions of products manufactured and/or supplied by several manufacturers.
 - (ii) Denies that it manufactured and/or supplied asbestos spray.

- (iii) Denies that it manufactured and/or supplied asbestos tape or asbestos rope.
- (iv) Asbestos tape and asbestos rope was manufactured and/or supplied by the "Bells companies".
- (v) The Bells companies were suppliers of asbestos composition during the relevant period.
- (vi) Admits that it manufactured asbestos cement flat sheets known as fibrolite and hardiflex between 1955 and 1982.
- (vii) Admits that between 1962 and 1983 it manufactured asbestos-containing building products known as compressed sheets.
- (viii) Admits that it manufactured asbestos-containing half pipe sections and loose composition in conjunction with CSR pursuant to the Hardies BI Partnership Agreement between the period September 1964 to June 1974.
- (ix) The composition of fibrolite flat sheets was approximately 12-15% asbestos mixed with cement and silica.
- (x) The composition of hardiflex included approximately 7-8% asbestos.
- (xi) The types of asbestos fibre used in the manufacture of fibrolite and hardiflex were chrysotile and occasionally amosite.
- (xii) The composition of James Hardie compressed sheets was 12-15% asbestos. The type of asbestos used in the manufacture of compressed sheets was chrysotile and occasionally amosite.
- (xiii) The composition of Hardie BI 85% magnesia plastic composition and pipe sections included 10-15% asbestos. The type of fibre used was amosite with small amounts of chrysotile.

- (xiv) Amaca, CSR, WGL and BAE are each Category 1 Defendants and Bovis is a Category 2 Defendant.
 - (xv) There should be no variation in the Standard Presumptions.
12. It is curious that Amaca in its Reply refers to fire control as there appears to be no Cross-Claim issued against it.
13. Bovis filed a Reply on 11 June 2010 which relevantly alleges:
- (i) It employed the Deceased between 6 December 1965 and 25 November 1967 and between 6 August 1968 and 17 March 1993.
 - (ii) It does not know and cannot admit the exposure in all of the circumstances alleged by the Deceased.
 - (iii) Bovis should be placed as a Category 2 Defendant with each of the others being placed in Category 1.
 - (iv) Bovis disputes being placed in Category 1 as alleged by Bells.
 - (v) There are relevantly two periods of exposure relied upon by the Plaintiff, namely:
 - (a) between 1958 and 1965 when the Deceased worked for a succession of builders exclusively using Amaca products (“the building period”); and
 - (b) two periods of employment with Bovis from 6 September 1965 to 25 November 1967 and 6 August 1968 to 17 March 1993 (“the Bovis period”).

- (vi) Bovis is not involved in the building period and during that period only Amaca could be liable.
- (vii) In the Bovis period, it is a Category 2 corporation, whereas all other Defendants/Cross-Defendants are Category 1.
- (viii) There should be a variation in the apportionment by 20% so as to "not unfairly prejudice Bovis as the sole Category 2 corporation.
- (ix) That in the building period between 1958 and 1965 (7 years) the Plaintiff was daily exposed to asbestos dust and fibre and the exposure was significant.
- (x) In the Bovis period which would be from 6 September 1965 to 25 September 1967 and 6 August 1968 to about 1984 (a total of 8 years) the exposure would have been minimal and that after 1984 there would have been virtually no exposure.

14. CSR provided a Reply on 1 June 2010 which relevantly alleges:

- (i) Hardie BI did not manufacture or supply asbestos cement products, nor did Hardie BI manufacture or supply asbestos spray, asbestos composition used for lagging, asbestos tape, asbestos rope or asbestos-containing fire doors.
- (ii) Asbestos composition is a generic term describing insulation material manufactured and supplied by several different entities.
- (iii) Hardie BI manufactured and supplied 85% magnesia half pipe sections between September 1964 and June 1974.
- (iv) Bovis in its Cross-Claim against Amaca alleges that fire doors were manufactured using asbestos-based fire retardant material manufactured by Amaca.

(v) Amaca, CSR, WGL, BAE should be placed in Category 1 and Bovis placed in Category 2.

(vi) During the period 28 September 1964 to 26 June 1974 CSR and Amaca were partners in the Hardie BI partnership.

(vii) Based on the Deceased's employment history and alleged exposure, the apportionment should be calculated as follows:

(a) 1958 to 6 September 1965 – Amaca – $7.7:28 \text{ years} \times 100\% = 27.5\%$;

(b) 7/9/65-1993 – Bovis – approx 20.3 years with exposure limited to 1986, Bovis 31.95%;

(c) WGL and BAE 17.76%;

(d) Amaca 20.27%;

(e) CSR 2.52%.

(viii) The total apportionment should therefore be:

(a) Bovis 31.95%

(b) Amaca 47.77%

(c) WGL/BAE 17.76%

(d) CSR 2.52%.

15. On 3 June 2010 WGL and BAE filed a joint Reply which relevantly alleges:

(i) WGL ceased operations on 30 September 1966 and BAE commenced operations on 1 October 1966 and ceased operations on 31 December 1979.

At no stage did WGL and BAE operate simultaneously, and therefore WGL and BAE should be treated as one entity for the purposes of calculating apportionment.

- (ii) Admits that it was one of a number of suppliers of asbestos spray, but does not admit it supplied spray to the sites at which the Deceased was exposed.
- (iii) Denies it manufactured or supplied compressed AC sheets.
- (iv) Denied manufacture of asbestos half pipe sections.
- (v) Admits that it was one of a number of suppliers of 85% magnesia, K-lite and high temperature ranges of half pipe sections, but does not admit that it supplied these to sites at which the Deceased was exposed. However, Amaca was the sole manufacturer of 85% magnesia products.
- (vi) Admits that it was one of a number of manufacturers and suppliers of tape and rope.
- (vii) Admits that it was one of a number of manufacturers and suppliers of asbestos composition.
- (viii) The Deceased did not allege it was exposed to products manufactured and/or supplied by WGL or BAE.
- (ix) Amaca, Wallaby Grip, CSR and Bovis should each be placed in Category 1 and Bovis should be placed in Category 2 as well.
- (x) The Standard Presumptions ought to be varied as against Bovis by 20 percentage points on the basis of its capacity, size and sophistication. Bovis was a national multi-faceted engineering construction and project management firm with substantial earnings and substantial employees.

- (xi) The periods of exposure should be split into periods A and B1 during which time the Deceased was only exposed to Amaca products. The liability for this period is 28.5%.
 - (xii) Period B2 accounts for 49.5% and period C accounts for 22%. In respect of B2, 45% should be borne by the Category 1 Defendants and 55% by the Category 2 Defendants. Period C represents 22% of total exposure.
 - (xiii) The final apportionment should be:
 - (a) Bovis 48%;
 - (b) WGL and BAE 8%;
 - (c) Amaca 36%;
 - (d) CSR 8%.
16. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) of the Standard Presumptions Order, and make a determination of what proportion of the whole each separate period bears having regard to a number of such periods, the length of each period and duration of and intensity of exposure to asbestos present in each such period.
17. It is thus not appropriate to determine the relative contributions simply on the basis of the elapsed years between the various periods of exposure.
18. Based upon the material before me, I determine that there were distinct periods of exposure, namely
- (i) From about 1958 to about 1965. Given the nature and intensity of the Deceased's exposure in this period. I determine that this period of exposure represented 35% of the total exposure.

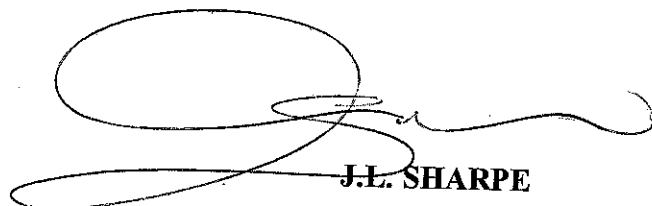
- (ii) From 6.12.1965 to 25.11.67. The exposure during this period was substantial and I determine that this period of exposure represents 8% of the total exposure;
 - (iii) From 6.8.68 until 31.12.78. The exposure during this period was substantial and I determine that this period of exposure represents 30% of the total exposure;
 - (iv) 1.1.79 until 31.12.89. The exposure during this period was not as substantial as previous and I determine that this period of exposure represents 20% of the total exposure;
 - (v) 1.1.90 until 17.3.93. The level and intensity of exposure was greatly reduced. I determine that this period of exposure represents 7% of the total exposure
19. Under Regulation 5(1) Period B relates to any exposure between 1 January 1961 and 31 December 1978 and the standard presumption for each category of Defendants in that period is Category 1 Defendants 65% and Category 2 Defendants 35%.
20. Between 1 January 1979 and 31 December 1989, which is known as Period C, a Category 1 Defendant is presumed to be 60% liable, whereas a Category 2 Defendant is presumed to be 40% liable.
21. After 1 January 1990, which is known as Period D, the Category 1 Defendant is liable for 40% and Category 2 Defendant for 60%.
22. All of the percentages between Category 1 and Category 2 Defendants are subject to an increase or decrease by an amount of up to 20 percentage points.
23. Notwithstanding the submissions made by WGL and BAE, I determine that Bovis does not come within Category 1 and remains at all times in Category 2.
24. For the purposes of this Determination, I have treated WGL and BAE as one Defendant.

25. I note the submissions as to the claimed lack of particulars relating to products supplied by both Amaca and WGL and BAE, but I determine that WGL and BAE as well as Amaca did supply products to Bovis and that, as between Amaca and WGL, the supply of asbestos material was approximately in the proportions of 60% Amaca and 40% WGL and BAE.
26. In the period September 1964 until June 74 Amaca and CSR were in a joint partnership as to certain of the asbestos cement products supplied by Amaca. Thus in the period 6.12.1965 to 25.11.67, and in the period 6.8.68 until June 1974, I have determined that theirs is a joint liability. For convenience sake, I have determined that the period between 6.8.68 until June 1974 represents 60 % of the Period 6.8.68 until 31.12.78 referred to above.
27. The question then arises as to the contribution between Category 1 and Category 2 Defendants, and in the present case the Standard Presumptions take into account the various aspects of the liability of the Defendants and Cross-Defendants and, accordingly, there should be no variation on the Standard Presumptions.
28. Thus, the following calculation as to liability can be made:
- (i) Amaca - $35\% + 65\% \times 8\% \times 60\% \times 50\% = 1.56\% + 65\% \times 30\% \times 60\% \times 66\% \times 50\% = 3.861\% + 65\% \times 30\% \times 60\% \times 34\% = 3.978\% + 60\% \times 20\% \times 60\% = 7.2\% + 40\% \times 7\% \times 60\% = 1.68\%$ - Total **53.279%**
 - (ii) Bovis - $35\% \times 8\% = 2.8\% + 35\% \times 30 = 10.5\% + 40\% \times 20\% = 8\% + 60\% \times 7\% = 4.2\%$ - Total **25.5%**
 - (iii) WGL/BAE - $65\% \times 8\% \times 40\% = 2.08\% + 65\% \times 30\% \times 40\% = 7.8\% + 60\% \times 20\% \times 40\% = 4.8\% + 40\% \times 7\% \times 40\% = 1.12\%$ - Total **15.8%**
 - (iv) CSR - $65\% \times 8\% \times 60\% \times 50\% = 1.56\% + 65\% \times 30\% \times 60\% \times 66\% \times 50\% = 3.861\%$ - Total **5.421%**

29. I therefore determine the total liability of the Defendants and Cross-Defendants as follows:

Bovis	25.5%
Amaca	53.279%
WGL/BAE	15.8%
CSR	5.421%
Total	100%

30. Pursuant to clause 61 of the Regulations, I appoint Amaca as the Single Claims Manager as it is the primary Defendant defined under clause 61(9).



J.L. SHARPE
Contributions Assessor

15 June 2010