

KEITH JOSEPH McPHERSON

v

DELTA ELECTRICITY, MACQUARIE GENERATION
AND POWER TECHNOLOGIES PTY LTD
Proceedings No 8293 of 2008

DETERMINATION OF APPORTIONMENT

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that each Defendant is liable to make pursuant to s.49 of the *Dust Diseases Tribunal Regulation 2007* (hereinafter referred to as "the Regulations"). He has also invited me to appoint a Single Claims Manager in accordance with clause 61(3)(b) of the Regulations.
2. By reason of clause 49 of the Regulations I am bound to assume that each Defendant is liable.
3. In the present case, there is no Statement of Particulars (Form 2) but I am provided with a copy of the Statement of Claim, the Plaintiff's Affidavit and a copy of the transcript of evidence taken before his Honour Judge Kearns on 11 November 2008. Accordingly, I will rely upon the aforesaid material and assume that the circumstance as to the Plaintiff's exposure to asbestos is as set forth in that material.
4. Having made the assumptions above, clause 49 of the Regulations requires that my determination be made solely on the basis of:
 - (a) The material referred to above;
 - (b) The Defendants' Replies;

(c) The Standard Presumptions, which are incorporated in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as “the Apportionment Order”).

5. The Standard Presumptions in the Apportionment Order require that liability be apportioned upon the basis that the Standard Presumptions apply with such variations as are appropriate to the case but within a permitted range.

The Plaintiff’s Particulars

6. The Plaintiff has brought proceedings in the Dust Diseases Tribunal against three named Defendants.
7. By his Statement of Claim the Plaintiff alleges that
- a. Between about 1960 and about 1970 he was employed by ICAL (the successor to International Combustion Australia Limited) (hereinafter referred to as “ICAL”), working on the installation of boilers.
 - b. In the course of his employment with ICAL the Plaintiff worked on sites at Munmorah, Vales Point and Liddell Power Stations
 - c. At all material times the power stations were owned and occupied by the First Defendant Delta Electricity, as to Munmorah Power Station and Vales Point Power Station; and by the Second Defendant Macquarie Generation, in respect of Liddell Power Station.
 - d. In the course of his employment with ICAL at the aforesaid power stations, the Plaintiff handled, fit, cut and installed asbestos containing insulation products and worked in areas where other workers handled, fit, cut and installed asbestos containing insulation product.
 - e. The Plaintiff suffers from mesothelioma.

8. In giving his evidence, the Plaintiff relied upon an affidavit dated 11 November 2008 which, so far as is relevant, provides as follows:
- (a) In about 1960 the Plaintiff obtained a position as a fitter and turner with ICAL and worked with that company for the next ten years. During this period of employment he was regularly exposed to and inhaled asbestos dust and fibre from lagging operations within Vales Point, Munmorah and Liddell Power Stations.
 - (b) The Plaintiff worked full time from 7.00 am to 4.00 pm and worked overtime on many occasions.
 - (c) The main buildings at Vales Point, Munmorah and Liddell Power Stations housed the crushing mills, boilers and the turbines and there was no separation of any of the work areas. The grates in the work areas had a woven pattern and were constructed from sections that could be lifted out and replaced.
 - (d) The power stations were brand new and were under construction during the time that the Plaintiff worked for ICAL.
 - (e) ICAL commissioned about one boiler per year.
 - (f) The Plaintiff did all sorts of work in connection with the construction of machinery at the power station but his main task was to assemble the crushing mills that were attached to the boilers.
 - (g) There were approximately four crushing mills for each boiler. The crushing mills were shipped in parts in big crates from England and it took about six months to assemble each mill.
 - (h) The crushing mills were located on the ground floor and then at the power stations there were pipes of various sizes, which carried super-heated air

and steam all over the boilers and around and above the workspace for several storeys.

- (i) Throughout the time the Plaintiff worked at Vales Point, Munmorah and Liddell Power Stations construction work went on around and above him and he was present when ladders were on site.
- (j) The construction work within the power stations included installation of hot pipes that formed part of the boilers and other machinery.
- (k) The Plaintiff was present while ladders were working on all the hot pipes and on the boilers, installing asbestos insulation on heat exchanges, steam turbines, pipes and the crushing mills. The ladders worked all over the power station.
- (l) Hot pipes were installed throughout the power station and then lagged with asbestos insulation material. The pipes varied in size from a couple of inches in diameter to a couple of feet in diameter.
- (m) The Plaintiff installed some hot pipes in connection with the installation of the crushing mills and installed pipes; during construction they were lagged with asbestos insulation.
- (n) There were many types of asbestos products installed within the power station, particularly by the ladders, including pre-fabricated lengths of asbestos lagging. The ladders cut the sections from time to time with handsaws and a lot of dust was sent up into the air when the ladders handled, cut and applied the asbestos lagging.
- (o) Some of the asbestos came in a powdered form and the Plaintiff observed ladders mixing asbestos powder with water to make a slurry.
- (p) Asbestos batts or mats were bolted onto the side of the mill to retain the heat and asbestos matting was used to wrap around pipes. Asbestos

tape, asbestos rope and asbestos cloth were also used.

- (q) The Plaintiff often worked in close proximity to ladders.
- (r) There was often dust in the air at Vales Point, Munmorah and Liddell Power Stations. The Plaintiff saw it in the air when the lagging work was under way. No precautions were taken to minimise the spread of dust from asbestos insulation around the power station. At the end of each day, dust and debris were swept up.
- (s) The work practices within the power stations did not change at all over the ten years that he worked there.
- (t) Over the ten years working for ICAL the Plaintiff was continuously and heavily exposed to and inhaled asbestos dust.

9. In evidence before his Honour Judge Kerns, the Plaintiff gave evidence that:
- a. He spent roughly the same period of time at Vales Point and Munmorah but a shorter time at Liddell.
 - b. He first worked at the Vales Point Power Station; he worked on the four boilers and remained there until the last boiler was completed.
 - c. He then moved to Munmorah, where some of the construction work had already begun and the Plaintiff commenced on No 1 Boiler.
 - d. He remained at Munmorah until the fourth unit was completed and the Plaintiff was one of the last to leave Munmorah.
 - e. He was then at Liddell for a couple of years and Vales Point was the longest, because it was the first power station that was constructed.

The First Defendant's Reply

10. Delta Electricity, by its Amended Reply alleged:
- (a) That it was the occupier of Vales Point and Munmorah Power Stations.
 - (b) That the Plaintiff's evidence was that he worked at Vales Point Power Station for a period of approximately four years from 1960 to 1964, and at Munmorah Power Station for approximately four years, from 1964 to 1968.
 - (c) Delta Electricity should be placed in Category 2; Macquarie Generation should be placed in Category 2; ICAL should be placed in Category 2 and also placed in Category 1. As to ICAL being placed in Category 1 Delta provides a statement from Mr. Mehmet and submits that ICAL comes within Note 11 to Clause 5 (2) of the Apportionment Order.
 - (d) That Delta only had constructive knowledge before 31 December 1969 and only had limited actual knowledge of the dangers from blue asbestos from 1 January 1970.
 - (e) That the periods of employment should be divided into:
 - Period 1 - namely 1960 to 1964, being 40% of the time
 - Period 2 – namely 1964 to 1968, being 40% of the time
 - Period 3 – namely 1968 to 1970, being 20% of the time
 - (f) That Period 1 covers both Period A and Period B of the Standard Presumption and that Period 1A, 1960 to 1961 is one year, or 10% overall and Period 1B 1961 to 1964 is three years, or 30% overall.
 - (g) In respect of Period 1A, ICAL should be placed in Category 1 and Delta placed in Category 2, as should ICAL. ICAL is liable for 75%, being the only Category 1 company and the remaining 25% should be divided between ICAL and Delta.

- (h) There should be no variation in the contribution and thus, ICAL should be responsible for 87.5% and Delta 12.5%; thus, if it does represent 10% of the total exposure, this results in ICAL being responsible for 8.75% and Delta being responsible for 1.25%.
- (i) As to Period 1B, again ICAL is in Category 1 and Delta and Power Technology are both in Category 2.
- (j) As to the Category 1 employer in Period 1B, ICAL is responsible for 65% and the remaining 35% to be divided between both ICAL and Delta, each getting 17.5%.
- (k) Thus, Period 1B, ICAL is responsible for 82.5% and Delta responsible for 17.5%. Reducing this to the period of exposure, ICAL is responsible for 24.75% and Delta is responsible for 5.25% and there should be no adjustment of the contribution.
- (l) Thus, in Periods 1A and 1B, ICAL are responsible for 33.5% and Delta are responsible for 6.5%.
- (m) In relation to Period 2, applying a similar approach in relation to ICAL as a Category 1 and Delta as a Category 2, the figures are:
- | | |
|-------|-------|
| ICAL | – 33% |
| Delta | – 7% |
- (n) In relation to Period 3, again Power Technologies in Category 1 and Macquarie and ICAL are both Category 2, and this results in ICAL being responsible for 82.5% and Macquarie 17.5%, which when reduced to the total of the period is 16.5% for ICAL and 3.5% for Macquarie Generation.
- (o) Thus, Delta apportions the items as:
- | | |
|----------------------|---------|
| ICAL | – 83% |
| Delta | – 17.5% |
| Macquarie Generation | – 3.5% |

The Second Defendant's Reply

11. Macquarie Generation, by its Amended Reply essentially repeats the Reply made by Delta.

The Third Defendant's Reply

12. ICAL, by its Reply, alleges as follows:
 - (a) Each Defendant should be classified as Category 2.
 - (b) ICAL, as the Plaintiff's employer, is alleged to have employed the Plaintiff as a fitter and turner at the premises owned, operated and occupied by Delta and Macquarie and the Plaintiff's exposure is alleged to have been from asbestos operations being carried out by others in his vicinity.
 - (c) That ICAL only had contracts to install boilers at Vales Points, Munmorah and Liddell and that the Plaintiff's main task was to assembling crushing mills.
 - (d) That the Power Station Inspectors supervised the work.
 - (e) That ICAL itself did not do the work involving the installation of asbestos containing products and manufacture or supply such products and there is no suggestion the boilers were installed with asbestos already in situ.
 - (f) That ladders employed by other substantially installed such asbestos.
 - (g) That each of the Defendants should be treated as equal in contribution.
 - (h) That ICAL had constructive knowledge only from approximately 1967.

- (i) That Delta and Macquarie should be attributed with actual knowledge from 1964.
13. Having regard to the Apportionment Order, the following factual considerations are to be noted:
- (a) The Plaintiff suffers from mesothelioma.
 - (b) The condition from which the Plaintiff suffers is indivisible.
 - (c) The total length of exposure to asbestos was approximately ten years.
 - (d) The type of asbestos to which the Plaintiff was exposed is unknown.
 - (e) The lag time between exposure and diagnosis is sufficient as against all Defendants.
 - (f) The exposure occurred between 1960 and 1970.
 - (g) ICAL was an employer of the Plaintiff.
 - (h) The Plaintiff performed work at the premises of the First Defendant for approximately 8 years and the Second Defendant for approximately 2 years.
 - (i) None of the Defendants took any steps to minimise the risk of being exposed to asbestos.

Factual Considerations

14. From the above the following can be concluded:

- (i) Approximately 80% of the Plaintiff's exposure occurred while employed by ICAL at Delta's premises.
- (ii) Approximately 20% of the Plaintiff's exposure to asbestos occurred while employed by ICAL at the premises of Macquarie Generation.
- (iii) The levels of exposure during each of the periods of exposure were approximately equal.
- (iv) The First and Second Defendants fall within Category 2, and the Third Defendant falls within Category 1. Thus in the period of the first year of exposure the respective apportionment is ICAL 75% and Delta 25%. In the seven-year period from 1961 to 1968 being the remaining time that the Plaintiff was exposed to asbestos at Delta's power stations the respective apportionment is ICAL 65% and Delta 35%. In the two-year period from 1969 to 1970 being the remaining time that the Plaintiff was exposed to asbestos at Macquarie's power station the respective apportionment is ICAL 65% and Delta 35%.

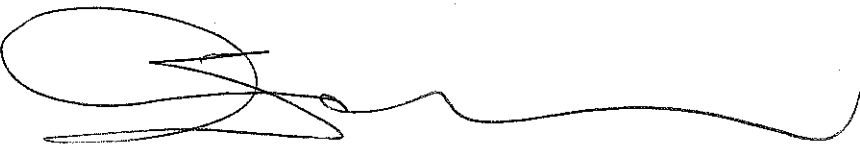
Application of the Standard Presumptions

- 15. In each period the Apportionment Order permits me to increase or decrease the percentages attribution by no more than 20 percentage points.
- 16. I have determined the liability to contribution having regard to the relative culpability of the Defendants and the causal potency of their contribution.
- 17. In the present case, the Standard Presumption should not be varied.

Determinations

- 18. I make the following determinations:

- (a) The Plaintiff's condition is mesothelioma and is indivisible.
 - (b) The First and the Second Defendant fall into Category 2. The Third Defendant falls into Category 1.
 - (c) The duration and intensity of the exposure to asbestos during each period of employment was similar.
 - (d) ICAL had a non-delegable duty of care for the Plaintiff as his employer.
 - (e) During the period of the Plaintiff's exposure to asbestos at Delta's Power Stations one year (10% of the total period of exposure) falls within Period A, and seven years (70% of the total period of exposure) falls within Period B.
 - (f) During the period of the Plaintiff's exposure to asbestos at Macquarie's Power Station two year, (20% of the total period of exposure) falls within Period B.
19. Accordingly, the Defendants are to contribute in the following proportions:
- (i) The First Defendant – 27% (i.e. 2.5% (Period A) + 24.5% (Period B))
 - (ii) The Second Defendant – 7% (Period B)
 - (iii) ICAL – 66% (i.e. 7.5% (Period A) + 45.5% + 13% (Period B))
20. I appoint ICAL as the SCM (clause 61(3)(b)) of the *Dust Diseases Tribunal Regulation 2007*.



J.L. Sharpe

20 November 2008