

**Denis Arthur Osborne –v- Eraring Energy**  
**Eraring Energy –v- Wallaby Grip Limited**  
**Eraring Energy –v- Amaca Pty Limited**  
**Eraring Energy –v- Power Technologies Pty Limited**  
**Eraring Energy –v- English Electric Company Pty Limited**  
**Eraring Energy –v- Alstom Australia Pty Limited**  
**DDT No 7140/07**

**Determination of Apportionment**

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that **Eraring Energy** (hereinafter referred to as "the Defendant") and each of the Cross Defendants are liable to make pursuant to clause 49 of the Dust Diseases Tribunal Regulation 2007 (hereinafter referred to as "the Regulations").
2. By reason of clause 49 of the Regulations, I am bound to assume that
  - a. The Defendant and each of the Cross Defendants are liable.
  - b. The circumstances of the Plaintiff's exposure to asbestos are as set forth in his Statement of Particulars (Form 2).
3. Having made the assumptions above, clause 49 of the Regulations requires that my determination be made solely on the basis of:
  - a. The Plaintiff's Statement of Particulars
  - b. The Defendant's Replies
  - c. Each of the Cross Defendant's Replies
  - d. The Standard Presumptions, which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.
4. The Standard Presumptions in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 requires that liability be apportioned upon basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range.

### The Plaintiff's Particulars

5. Denis Arthur Osborne (hereinafter referred to as "The Plaintiff") has brought proceedings in the Dust Diseases Tribunal against the Defendant.
6. By his Statement of Particulars the Plaintiff alleges that: -
  - a. He was employed as a contractor working at the Tallawarra Power Station intermittently between 1959 and 1964. In particulars provided to the Defendant it is asserted by the Plaintiff that he could only have worked at the Tallawarra Power Station between 1959 and 1961. It is to be noted that this was the period of his presence in Australia. The Particulars were provided on 10<sup>th</sup> December 2007, and clarify the period of working at the Power Station.
  - b. He was present while asbestos insulation was installed throughout the Tallawarra Power Station.
  - c. Asbestos dust and fibre fell over the scaffolding that he was required to take down.
  - d. Asbestos dust and fibre fell over the Plaintiff while he performed his work.
  - e. He assisted in the construction of the power station and used asbestos cement sheeting, which cut and handled.
  - f. He was exposed to asbestos cement sheeting, pre-formed asbestos cement pipes section, asbestos composition, asbestos rope, asbestos block insulation.
  - g. He was exposed constantly to asbestos dust and fibre.
  - h. Generally the level of intensity of exposure was medium to high.
  - i. The Plaintiff asserts that there was no other exposure to asbestos cement or fibre.
  - j. He claims to have sustained the following asbestos-related conditions:
    - i. Calcified asbestos related pleural plaques
    - ii. Asbestosis
    - iii. Honey combing
7. It can be seen from the above, that the Plaintiff's Statement alleges approximately 6 years of intermittent exposure while employed as a contractor by the First Defendant. Period A is from 1959 until 31.12.61 (i.e. 24 months) and Period B is from 1.1.61 – 1964 (i.e. 48 months). However, it is clear that the Plaintiff's exposure could only have occurred while he was in Australia, and that his period of intermittent employment was from 1959 until 31.12.1961 (i.e. 24 months in Period A and 12 months in Period B).

### The Defendant's Reply

8. The Defendant by its Amended Reply alleges that: -
- a. There is conflicting evidence as to the place of the Plaintiff's employment, and that there is no proof of the Plaintiff's assertion that he worked at the Tallawarra Power Station (Notwithstanding that, please note that I am bound to accept the Plaintiff's assertions as being correct).
  - b. That the Plaintiff provided evidence to the Dust Diseases Board and to other persons of other exposure to asbestos (However, whether this be the case or not, it is irrelevant to the present assessment because I am bound to accept the Plaintiff's assertions as being correct).
  - c. The Defendant should be placed in Category 2.
  - d. The First Cross Defendant, **Wallaby Grip Limited** (hereinafter referred to as "Wallaby Grip") should be placed in Category 1.
  - e. The Second Cross Defendant, **Amaca Pty Limited** (hereinafter referred to as "Amaca") should be placed in Category 1.
  - f. The Third Cross Defendant, **Power Technologies Pty Limited** (hereinafter referred to as "Power Technologies") should be placed in Category 1, but can also be placed in Category 2.
  - g. The Fourth Cross Defendant, **English Electric Company Pty Limited** (hereinafter referred to as "English Electric") should be placed in Category 1.
  - h. The Fifth Cross Defendant, **Alstom Australia Pty Limited** (hereinafter referred to as "Alstom") should be placed in Category 1, but can also be placed in Category 2.
  - i. The Defendant can be said only to have had constructive knowledge before 31.12.1969, and limited actual knowledge of the dangers of Blue Asbestos from 1.1.70. It is noted that the Plaintiff was intermittently employed at the Power Station between 1959 and 1964. Accordingly, the Defendant asserts to have had only constructive knowledge at the time that the Plaintiff worked at the Power Station.
  - j. Power Technologies had constructive knowledge, by reason of its parent's actual knowledge, but also if it were in Category 1, then it is deemed to have had actual knowledge.
  - k. Alstom had constructive knowledge, by reason of its parent's actual knowledge, but also if it were in Category 1, then it is deemed to have had actual knowledge.

- l. The Standard presumptions should be varied against the Category 1 Cross Defendants because of their "identity, capacity, size and state of sophistication" and the history of these parties involvement in the asbestos industry.
- m. Amaca should bear higher percentage liability than any other Category 1 or Category 2 Defendant or Cross Defendant.
- n. The Plaintiff worked at the Power Station for only a total of 7 – 8 months.
- o. That the Standard Presumption should not be varied.
- p. In its original Reply, that the contributions should be made as follows only for Period A because of the assertion that employment must have occurred in the earlier stages of the construction of the Power Station (without explaining what it was that the Plaintiff must have occupied himself with at the other times he was on site): -
- |  |         |
|--|---------|
| i. The Defendant (Cat 2)               | 8.333%  |
| ii. Wallaby Grip (Cat 1)               | 15%     |
| iii. Amaca (Cat 1)                     | 15%     |
| iv. Power Technologies (Cat 1 + Cat 2) | 23.333% |
| v. English Electric (Cat 1)            | 15%     |
| vi. Alstom (Cat 1 + Cat 2)             | 23.333% |
- q. In its amended Reply, the Defendant has sought to introduce earlier exposures, which might arise out of the Plaintiff's answers to particulars. I am bound by the Plaintiff's Statement, subject to the clarification of the period of exposure referred to above.
- r. Accordingly, I am not going to speculate about earlier exposures, their intensity or otherwise, but will confine my apportionment to the period the subject of the Plaintiff's claim.

### Wallaby Grip's Reply

9. Wallaby Grip by its Reply alleges that: -
- a. It did not manufacture asbestos cement sheeting, pre-formed asbestos pipe sections or asbestos block insulation.
  - b. It does not admit supply asbestos composition.
  - c. It manufactured asbestos rope, and does not admit supply to the Defendant.
  - d. Amaca manufactured asbestos Pipe sections.

- e. At the time that pipe sections or K-Lite pipe sections were used, the same brand of composition (i.e. Amaca's) would have been used.
- f. The Defendant should be a Category 2 defendant, and also a Category 1 defendant as it was involved in the installation of asbestos products.
- g. Wallaby Grip should be a Category 1 defendant.
- h. Amaca should be a Category 1 defendant.
- i. Power Technologies should be a Category 1 defendant.
- j. English Electric should be a Category 1 defendant.
- k. Alstom should be a Category 1 defendant.
- l. The Standard Presumptions should be varied as against the Defendant because the Defendant had actual knowledge of the dangers of Asbestos in the mid 1950s.
- m. The Standard Presumptions should be varied as against Amaca because it manufactured and supplied the vast majority of the products used.
- n. That in Period A all of the defendants are Category 1 (75%), and the Defendant, Power Technologies and Alstom are Category 2 defendants (25%), and that weighting should occur against Amaca resulting in the following calculation
  - i. The Defendant 11.333%
  - ii. Wallaby Grip 3%
  - iii. Amaca 60%
  - iv. Power Technologies 11.333%
  - v. English Electric 11.333%
  - vi. Alstom 11.333%
- o. That Period A represents 25% of the total exposure.
- p. That in Period B all of the defendants are Category 1 (65%), and the Defendant, Power Technologies and Alstom are Category 2 defendants (35%), and that weighting should occur against Amaca resulting in the following calculation
  - i. The Defendant 14.26%
  - ii. Wallaby Grip 2.6%
  - iii. Amaca 52%
  - iv. Power Technologies 14.26%
  - v. English Electric 14.26%
  - vi. Alstom 14.26%
- q. That Period A represents 75% of the total exposure.

r. That if the products to which the Plaintiff was exposed were Amaca's and if one does not accept actual knowledge in the Defendant, then the total weighted result is: -

i. The Defendant	13.3. %
ii. Wallaby Grip	2.7%
iii. Amaca	54.7%
iv. Power Technologies	13.3%
v. English Electric	2.7%
vi. Alstom	13.3%

s. That if the products to which the Plaintiff was exposed were not Amaca's and if one does not accept actual knowledge in the Defendant, then the total weighted result is: -

i. The Defendant	21.9%
ii. Wallaby Grip	11.4%
iii. Amaca	11.4%
iv. Power Technologies	21.9%
v. English Electric	11.4%
vi. Alstom	21.9%

### Amaca's Reply

10. Amaca by its Reply alleges that:

- a. It does not know the trade names and/or brand names of the products to which the Plaintiff alleges exposure.
- b. It did not manufacture asbestos rope, (but does not make the same assertion as to the other asbestos cement products identified generically by the Plaintiff).
- c. It claims to becoming aware that inhalation of asbestos fibres could cause asbestosis, in the mid 1950s.
- d. That Category 1 defendants are
  - i. Wallaby Grip
  - ii. Amaca
  - iii. Power Technologies
  - iv. English Electric
  - v. Alstom
- e. That Category 2 defendant is

- i. The Defendant
- f. That the standard presumptions should be varied as against the Defendant by the maximum 20%.
- g. That the Defendant should be attributed with actual knowledge.
- h. That the apportionment should be as follows:
 

i. The Defendant	51.7%
ii. Wallaby Grip	9.66%
iii. Amaca	9.66%
iv. Power Technology	9.66%
v. English Electric	9.66%
vi. Alstom	9.66%

### **Power Technologies' Reply**

- 11. Power Technology by its Reply alleges that:
  - a. It was not an occupier of the Power Station.
  - b. That there is no allegation that the Plaintiff worked in areas near to areas where Power Technology carried out its work.
  - c. That Category 1 defendants are
    - i. Wallaby Grip
    - ii. Amaca
    - iii. Power Technologies
    - iv. English Electric
    - v. Alstom
  - d. That Category 2 defendant is
    - i. The Defendant
  - e. That the standard presumptions should be varied as against the Defendant by the maximum 20%.
  - f. That the Defendant should be attributed with actual knowledge.

### **English Electric's Reply**

- 12. English Electric by Its Reply alleges that:
  - a. It did not know of the Plaintiff's alleged exposure.

- b. It was not reasonably foreseeable that the Defendant would expose the Plaintiff to an unreasonable risk of injury.
- c. The standard presumptions should be varied to the maximum extent possible as against the Defendant, because it had actual knowledge of the dangers of asbestos from 1958, and because it was experienced in the overall management and control of power stations.

### **Alstom's Reply**

- 13. Alstom by its reply alleges:
  - a. It was not an occupier of the Power Station.
  - b. It was contracted to construct some of the turbines at Tallawarra Power Station, and thus was a subcontractor to the Defendant.
  - c. That Category 1 defendants are
    - i. Wallaby Grip
    - ii. Amaca
    - iii. Power Technologies
    - iv. English Electric
    - v. Alstom
  - d. That Category 2 defendant is
    - i. The Defendant
  - e. It does not concede supplying any asbestos products.
  - f. It did not carry out any construction activities at Tallawarra Power Station after 1961.
  - g. That the standard presumptions should be varied as against the Defendant by the maximum 20%.
  - h. That the Defendant should be attributed with actual knowledge.

### **Standard Presumptions – Factual Considerations**

- 14. Having regard to Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 – the following factual considerations are to be noted:
  - a. The Plaintiff suffers from a divisible condition.
  - b. The condition from which the Plaintiff suffers is:
    - i. Calcified asbestos related pleural plaques
    - ii. Asbestosis
    - iii. Honey combing

- c. The total length of exposure to asbestos was between 1959 and 1961.
- d. The type of asbestos to which the Plaintiff was exposed is unknown.
- e. The lag time between exposure and diagnosis is sufficient.
- f. None of the defendants took any steps to minimise the risks of being exposed to asbestos.

### **Factual Conclusions**

- 15. That the Plaintiff was intermittently exposed to asbestos over a 24 month period between 1959 and 1961 (Period A) and a 12 months period in 1961 (Period B).
- 16. The Defendant while being included in Category 2 probably had actual knowledge of the risks associated with asbestos exposure.
- 17. It is more likely than not that Amaca manufactured and supplied the materials identified by the Plaintiff with the exception of the asbestos rope, which was more likely than not supplied by Wallaby Grip.
- 18. Given the above factual conclusions, the question arises as to whether the standard presumptions should be varied.

### **Application of the Standard Presumptions**

- 19. In each period the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 permits me to increase or decrease the percentage attribution by no more than 20 percentage points.
- 20. I have determined the liability to contribute having regard to the relative culpability of the Defendants and the causal potency of their contribution.
- 21. In the present case the standard presumptions should be varied.
- 22. In the case of the Defendant this should be varied upwards by the maximum of 20%, with a consequential variation downwards for the Category 1 defendants. I do this, having regard to the numerous decision cited by the defendants, and the arguments advanced by them which I accept.

**Determinations**

23. I make the following Determinations:
- a. The Plaintiff's condition is divisible.
  - b. The Defendant falls into Category 2, while each of the Cross Defendants falls within Category 1.
  - c. The Duration, and Intensity of the exposure to asbestos was similar.
  - d. That the Defendant's contribution be increased by the maximum allowed (i.e. 20 percentage points) during bothy Period A and Period B.
  - e. The Remaining contribution of 51.60% is divided among the Category 1 defendants.
  - f. That as between Amaca and Wallaby Grip they should not be considered equal, given the products identified by the Plaintiff and the likelihood that they were the products of Amaca rather than Wallaby Grip, and accordingly between themselves they should be apportioned in the ratio of 3:1 (i.e. 10.32% x 2 = 20.64% apportioned in the ratio of 3:1). In this regard I accept the arguments advanced by Wallaby Grip
  - g. Accordingly the Defendants are to contribute in the following proportions:
    - i. The Defendant = 48.40%
    - ii. Wallaby Grip = 5.16%
    - iii. Amaca = 15.48%
    - iv. Power Technology = 10.32%
    - v. English Electric = 10.32%
    - vi. Alstom = 10.32%

Dated April 28,2008



**J. L. SHARPE**