

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No.282 of 2009

BETWEEN:

DUSAN ANTHONY PAUHLIK
Plaintiff

AND:

ERARING ENERGY
Defendant/Cross-Claimant

BABCOCK INTERNATIONAL LIMITED
First Cross-Defendant

BABCOCK AUSTRALIA PTY LIMITED
Second Cross-Defendant

POWER TECHNOLOGIES PTY LIMITED
Third Cross-Defendant

AMACA PTY LIMITED
Fourth Cross-Defendant

CSR LIMITED
Fifth 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 the apportionment as between the 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 requires that this determination be made on the basis of the Plaintiff's Statement of Particulars and the replies as filed by the Defendants.
4. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter

referred to as "the Standard Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.

5. In the present matter, Dusan Anthony Pauchlik (hereinafter referred to as "the Plaintiff") took proceedings in the Dust Diseases Tribunal claiming damages arising out of his exposure to asbestos between 13 March 1967 and 24 April 1982 while he was a cleaner, labourer, assistant farmer and auxiliary plant attendant and plant controller at the Bunnerong Power Station and the Pymont Power Station in Sydney.
6. Eraring Energy (hereinafter referred to as "Eraring") employed the Plaintiff during the whole of the period from 1967 until 1982. The Plaintiff suffers from mesothelioma, which the Plaintiff asserts arose out of his exposure to asbestos in the course of performing his duties.
7. On 27 October 2009 the Plaintiff filed a Statement of Particulars and, insofar as is relevant, asserts the following:
 - (i) Apart from his employment with Eraring, he was not otherwise exposed to asbestos.
 - (ii) Between 13 March 1967 and 15 December 1969 the Plaintiff worked at Bunnerong Power Station and in performing his duties he was exposed to significant amounts of asbestos, which insulated hot areas. Ladders were often working around the station in the Plaintiff's presence.
 - (iii) Between 15 December 1969 and 24 April 1982 the Plaintiff was employed at the Pymont Power Station and again was exposed to asbestos.
 - (iv) The Plaintiff was exposed to asbestos almost every working day whilst working at Bunnerong Power Station and Pymont Power Station.
 - (v) The Plaintiff's exposure was high up until 1982 as the Plaintiff worked in very heavy concentrations of asbestos dust.
 - (vi) Most of the Plaintiff's asbestos exposure came from asbestos insulation around the steam pipes and other equipment.
 - (vii) The Plaintiff's exposure arose out of being in the vicinity of others who were handling asbestos products.
8. It can be seen that the Plaintiff's condition is an indivisible one, and I have acted accordingly.
9. Eraring filed a Cross Claim on 30th October 2009, which relevantly claims contribution from:

- (i) Babcock International Limited (hereinafter referred to as "BIL") for the period of 13th March 1967 to 14th December 1969;
- (ii) Babcock Australia Pty Ltd (hereinafter referred to as "BAL") for the period of 13th March 1967 to 14th December 1969;
- (iii) Power Technologies Pty Limited [hereinafter referred to as "Power"] for the period of 15th December 1969 until November 1974
- (iv) James Hardie Pty Limited for the period 13th March 1967 and November 1974.

10. I am aware of a further Cross-Claim having been filed in this matter by Amaca against CSR, but it appears that such a claim is outside of the contributions assessment to which I am directed and, accordingly, I do not make any inclusion for such a claim.

11. Eraring filed a Reply on 24 November 2009 and, so far as is relevant, alleges the following:

- (i) Eraring concedes employment and the period of employment as well as exposure to asbestos.
- (ii) Eraring should be placed in Category 2.
- (iii) BIL should be placed in Category 1.
- (iv) BAL should be placed in Category 1.
- (v) Amaca should be placed in Category 1.
- (vi) Power should be placed in Category 1.
- (vii) There should be no variations in the Standard Presumption except in relation to Amaca.
- (viii) That the exposure should be confined to the period 1967 to November 1974 because after that time the Plaintiff would not have been exposed to asbestos [contrary to the Plaintiff's assertions].
- (ix) The period from March 1967 until November 1974 consists of a total of 92 months which should be divided into: period 1 being from 13/3/67-3/12/68 totalling 22.83% (being the period of employment at Bunnerong B Power Station); period 2 from 4/12/68-14/12/69 representing 13.04% (employment at the Bunnerong C Power Station); and period 3 from 15/12/69-November 1974 representing 64.13% (while employed at Pymont B Power Station)
- (x) All of the separate periods fall within "Period B" of the Standard Presumptions.
- (xi) The apportionment should be BIL 5%, BAL 5%, Power Technologies 21%, Amaca 34%, and Eraring 35%, total 100%.

12. Power Technologies Pty Ltd filed a Reply on 4 December 2009 and, so far as is relevant, alleges that:
- (i) Eraring should be placed within Category 2.
 - (ii) The Cross-Defendants should be placed within Category 1.
 - (iii) The Standard Presumption should be varied to increase the liability of Eraring to reflect its size and its position as the owner and occupier of both the Bunnerong and Pyrmont Power Stations.
 - (iv) Eraring had actual knowledge of the dangers of asbestos (see *Nichols v Pacific Power per Johns J and Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co Pty Ltd (Re Hay) (No.4)* 18 NSWCCR 653, paras 176-183.
13. Amaca filed a Reply on 7 December 2009 [as amended] and, so far as is relevant, submits that:
- (i) The Defendant and the Cross-Defendants should all be placed in Category 1.
 - (ii) Additionally, Eraring should be placed in Category 2.
 - (iii) The Plaintiff's assertions are direct evidence that Eraring undertook activities installing asbestos.
 - (iv) Eraring as a Category 2 Defendant was a large organisation that had actual knowledge of the risks of asbestos at the time of the exposure and, accordingly, the Standard Presumption should be varied by the maximum percentage against Eraring.
 - (v) The exposure can be divided into two periods, namely period 1 being March 1967 to December 1969 while the Plaintiff was employed at the Bunnerong Power Station, and period 2 between December 1969 and November 1974 while the Plaintiff was employed at the Pyrmont Power Station.
 - (vi) Period 1 represents 35.87% of the total asbestos exposure.
 - (vii) Period 2 represents 64.13% of the Plaintiff's alleged total exposure.
 - (viii) Amaca submits that the total apportionment of liability should be: Eraring 65.45%, BIL 3.23%, BAL 3.23%, Power Technologies 7.21%, Amaca 10.44%, CSR 10.44%.
14. BIL provided a Reply on 8 December 2009 and, so far as is relevant, provides that:
- (i) Eraring should be placed in Category 2.
 - (ii) The Cross-Defendants should be placed in Category 1.
 - (iii) The Standard Presumption should be varied by 20 percentage points due to the state

of knowledge of Eraring and presumably its size.

15. BAL filed a Reply on 8 December 2009 and, so far as is relevant, provides that:
 - (i) Eraring should be placed in Category 2 with the Cross-Defendants each being placed in Category 1.
 - (ii) The Standard Presumption should be varied against Eraring by the maximum 20 percentage points permitted on the basis of Eraring's knowledge together with its size and sophistication.
 - (iii) The apportionment as between the Cross-Defendants should be varied given the relative contributions that each made to the Plaintiff's exposure.
 - (iv) The periods of employment should be divided into: period 1 from 13/3/67-3/12/68 being 11.4% of total exposure; period 2 being from 4/12/68-14/12/69 representing 6.8% of total exposure; and period 3 from 14/12/69-24/4/82 being 81.8%.
 - (v) BAL is only sued in respect of period 1.

16. BAL filed an Amended Reply on 10 December 2009 which, so far as is relevant, points out that:
 - (i) In period 1 while the Plaintiff worked at Bunnerong B Power Station the only parties who could be liable for the Plaintiff's exposure were Eraring, Amaca, BIL and BAL.
 - (ii) Eraring's apportionment should be increased by 20 percentage points to 55%.
 - (iii) Amaca's apportionment should be increased, as should BIL's apportionment.
 - (iv) Regard should be had to the decision of *Royal* where Curtis J apportioned liability 75% to BIL and 15% to BAL, and only 10% to Eraring. (It is to be remembered that there were specific fact matters in that case, which distinguish it from the present case.)
 - (v) The contribution should be: Eraring 38.38%; Amaca 33.02%; BIL 2.14%; BAL 0.43%; Power Technologies 26.04%.

17. Initially the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole each separate period bears, having regard to the number of such periods, the length of each period, the duration of and the intensity of exposure to asbestos present in each such period.

18. I am required to have regard to the Plaintiff's Statement of Particulars, which alleges that his exposure to asbestos was constant throughout the whole of the period of his employment as alleged. However it is apparent that there was a lessening of the level of exposure after 1974.

Accordingly, the Plaintiff's period of exposure may be divided into the following periods, namely:

- (i) 13.3.67 to 14.12.69 - Bunnerong B Power Station and Bunnerong C Power Station.
- (ii) 15.12.69 to 11.1974 - Pymont Power Station.
- (iii) 11.1974 to 24.4.1982 - Pymont Power Station.

19. Based upon the material available to me, the first and the second periods of exposure are greater than the third period of exposure and should be apportioned as follows:

- (i) 13.3.67 to 14.12.69 - Bunnerong B Power Station and Bunnerong C Power Station = 25%;
- (ii) 14.12.69 to 11.1974 - Pymont Power Station = 50%;
- (iii) 11.1974 to 24.4.1982 - Pymont Power Station = 25%

20. All of the periods of exposure prior to 1.1.79 fall within period B of the Standard Presumption and thus in that period Category 1 Defendants bear 65% of liability as against Category 2 Defendants which bear 35% of the liability, subject to any variation, whereas after 1.1.79 Category Defendants bear 60% and Category 2 Defendants bear 40%, subject to variation.

21. I determine that Eraring falls into Category 2 and the Cross-Defendants fall within Category 1.

22. Insofar as Category 1 Defendants are concerned, the liability should be divided equally.

23. The question then arises as to the contribution between Category 1 and Category 2 Defendants and, in the present case, having regard to the level of knowledge, the size and the operations of Eraring, the Standard Presumption should be varied to increase their proportion as a Category 2 Defendant by 15 percentage points.

24. Thus, the following calculations as to liability can be made:

- (i) In the first period, 13.3.67 to 14.12.69 - Bunnerong B Power Station and Bunnerong C Power Station, representing 25% of the total exposure, Eraring is to bear 50%, with BIL, BAL and Amaca to bear the remaining 50% in equal proportions.
- (ii) In period 2, 14.12.69 to 11.1974 - Pymont Power Station, representing 50% of the

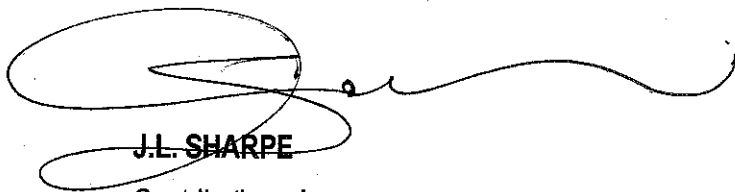
total exposure Eraring is to bear 50%, with Power and Amaca to bear equal proportions for the remaining 50%.

(iii) In period 3, Eraring is to bear 100%, of the liability.

25. Therefore, I determine the total liability of the Defendant and the Cross-Defendants as follows:

Eraring:	62.50%
Amaca:	16.66%
BIL:	4.17%
BAL:	4.17%
Power:	<u>12.5%</u>
Total	100%

26. Pursuant to clause 61 of the Regulations, I appoint Eraring as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE
Contributions Assessor

29th December 2009