

## CONTRIBUTIONS ASSESSMENT DETERMINATION

### COURT DETAILS

Court	Dust Diseases Tribunal of New South Wales
Registry	Sydney
Case Number	383 of 2009

### TITLE OF PROCEEDINGS

Plaintiff	Frances Joy Reilly (as legal personal representative of the Estate of the late Terry James Reilly)
First Defendant	Malabar Electric Pty Limited
Second Defendant	NSW Land & Housing Corporation
Third Defendant	State of New South Wales
Fourth Defendant	John Goss Projects Pty Limited

1. The Registrar of the Dust Diseases Tribunal referred this matter to me under cover of his letter of 8 July 2010, and pursuant to Regulation 49(1) of Dust Diseases Tribunal Regulation 2007 (DDTRegs) for the determination of the contribution that each Defendant is to make to the Plaintiff's claim, the parties having failed to reach agreement as to apportionments.
2. The Plaintiff has sued 4 Defendants. I list the Defendants and the action each has taken for consideration in this contributions assessment as follows:-
  - 2.1 First Defendant (Malabar) - No Appearance or Reply has been filed or served by this Defendant.
  - 2.2 Second Defendant (NSW Land) and Third Defendant (the State) – Appearances and a common Reply (12 May 2010) has been filed for these Defendants

2.3 Fourth Defendant (Goss) - An Appearance (27 May 2010) and a Reply (9 July 2010) has been filed for this Defendant

### 3. **Basis for Determination**

3.1 DDTReg 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-

- The assumption that each Defendant is liable;
- On the Plaintiff's Statement of Particulars (PSP) (Part 3 and Part 4) relating to his occupational and non-occupational exposure to asbestos; and
- On the Defendants' Replies;
- On the Standard Presumptions as to apportionment.

3.2 The relevant "Standard Presumptions" are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 - Schedule 1.

### 4. **Clause 5(8) and Defendant Categories**

4.1 It is alleged that the late Mr Reilly for whom the Plaintiff now sues suffered and died as a consequence of asbestosis. This is a divisible disease. Clause 5(8) of the Standard Presumptions directs the methodology which I should adopt in determining apportionments when considering multiple contributions to a claim involving a divisible disease. More specifically, this clause directs that:-

- (i) If I am satisfied by reference to the existence of separate periods of exposure then instead of the prescribed apportionment, I should make a differential determination of the contribution of each of those periods.
- (ii) If so, I am to determine what proportion of the whole each separate period of exposure bears having regard to the number of periods, the length of such period and the duration of and intensity of exposure to asbestos within each period and that I treat each separate period as

equal in contribution to the disease unless satisfied that a variable weighting ought to apply; and

(iii) I then apply the proportions set out in the Table which forms part of Clause 5(1) i.e. changing the apportionments for the different index periods.

4.2 It is necessary for me to determine for the purpose of application of the Clause 5(1) proportions, to determine the Category of each employer as regulated.

4.3 Clause 5(2) of the Standard Presumptions goes on to define Category 2 defendants as those which cannot be classified as a Category 1 Defendant including users of asbestos and products, plant and equipment containing asbestos as well as occupiers of premises containing them.

4.4 Clause 5(2) (b) directs that Category 2 defendants include corporations who are employers of staff who in the course of, or as an incidental to their employment were exposed to asbestos. In their Reply it is submitted by NSW Land and the State that both Malabar and Goss are Category 1 and that NSW Land and the State are Category 2. I see no justification for that submission and disagree with it. I determine that all defendants are in Category 2 being users of asbestos products in the building industry.

I proceed accordingly.

## 5. Periods of Exposure 4.1(i) :-

5.1 By reference to the Plaintiff's Statement of Particulars (PSP) I am able to determine there are 2 distinct but relevant periods of exposure. More particularly I note Annexure 1 to the PSP is the Industrial History of Mr Reilly, and verified by him on 19 October 2009 which describes his periods of work and exposure to asbestos dust and fibre relevant to my exercise herein. being:-

- (a) Period 1 – 1960 to 1980 (240 months) - NSW employment with Malabar
- (b) Period 2 – 1997 to 2009 (156 months) – NSW employment with Goss.

(c) And that for **3 years** within Period 1 and in the course of his Malabar employment doing housing commission work, responsibility for the late Mr Reilly's asbestos exposure also falls on NSW Land as the occupier.

(d) Further that for some **3 months** and other unspecified periods at schools and hospitals within Period 1 the State as occupier has liability for significant asbestos exposure.

I am satisfied by reference to the existence of separate periods of exposure that instead of the prescribed apportionment, I should make a differential determination of the contribution of each of those periods.

5.2 With **Malabar** the varying exposure to asbestos in Period 1 occurred in the course of performing electrical work during his electrician's apprenticeship. (I note Annexure 4 to the PSP being the Malabar Managers letter to the Electricity Authority as to Mr Reilly's **12 years** "serving his electrical trades apprenticeship) Mr Reilly generally describes his Malabar work as 6 days per week and 20% of the time on Sundays as well (although inferentially in "the later years ", perhaps the remaining **8 years** which he describes as "more time as a contracts manager", there may have been a difference in his duties/activities for the purposes of my assessment). Nevertheless he generally describes doing electrical wiring work on a variety of buildings including schools, houses, institutions, hospitals etc which he separately particularises to include:-

- a) **3 years** doing housing commission contract work (i.e. relevant to **NSW Land**) following carpenters to cut and drill holes in fibro walls to install power and light with exposure in the hand-drilling process and from the dust that was left to lie in the new cottages until the painters came
- b) **Several months** on a job at Callan Park Hospital (i.e. relevant to **the State**) with exposure to asbestos from pipes being lagged in his presence and from other workers throwing raw asbestos and slurry around whereby he was covered in dust (It is notable in Annexure 5 of the PSP being the Department of Public Works Specification for Callan Park and for the asbestos lagging, switchboard backing, asbestos cement ceilings and insulation materials which confirms the extensive use of asbestos in that building). Specification for the use of asbestos products by a government department which might reasonably be expected to have greater access to scientific and medical information of its dangers operates on my considerations as a weighting factor for the purpose of this apportionment exercise.

- c) His otherwise general electrical work in the course of his employment with Malabar which required cutting and/or drilling millboard backings on and for new switchboards. This sometimes included the use of an angle grinder. He describes frequently encountering and drilling, cutting or chopping through asbestos cement to install wiring or electrical fittings. Whilst generally short exposures they were “relatively frequent during a usual week’s work”. He describes ceiling spraying with possible asbestos exposure and summarises his tasks over **20 years and 6 or 7 days a week leading to “at least 16 hours a week in varying situations where he was either handling asbestos materials or at least experiencing some bystander exposure”**.
- d) Doing the best I can with the history provided I would regard the heavier handling experiences to have been in the first 12 years and the final (supervisory) 8 years to have been more of the bystander exposure. From his description I find that NSW Land work and the State work as being equally complicit as occupiers and specifiers of the use of asbestos materials .eg. though only “several months” the description of the work at Callan Park involving raw asbestos fibre as it did, might reasonably be regarded as the heaviest exposure he suffered. The State also was the occupier of schools and hospitals where the late Mr Reilly was exposed to asbestos on his account.

5.3 Annexure 1 also includes Mr Reilly’s work history between 1980 and 1988 and from that history I am satisfied that any exposure to asbestos was de minimis or as he says, likely none.

5.4 However Mr Reilly’s description (as recorded) of his employment from 1987 to 1997 speaks of his uncertain belief that ceiling spraying to which he was exposed contained asbestos. In contrast to that account the PSP at 3.1 declares that there was no exposure to asbestos in this employment. In resolving this apparent inconsistency I have concerns as to the likelihood that by 1987/88 commercial sprayers were still using asbestos and in the absence of more specific evidence I accept the declaration at PSP 3.1.

5.5 Mr Reilly’s account in Annexure 1 is of exposure in Period 2 to” some asbestos materials and dust...whilst...working on demolition sites during...” employment with Goss from **1997 to 2009**. However his first description of his employer is as a “firm that puts electrical services into new high rise buildings”. He then described jobs where work was done in existing old buildings where asbestos removal contractors were engaged. Mr Reilly expressed doubts as to the efficacy, at least as to safety, in the removal

methods employed and he expresses the view that he had exposure to “**some asbestos materials and dust ... with some greater exposure whilst ...working on demolition sites during this employment**”. He records being 6 days a week on site over the 12 months of demolition of the Fox Studios. Otherwise he said he “was frequently on site during the demolition of the old structures” which I read as being a reference to Prince of Wales Hospital, the Hilton Hotel and Sydney Town Hall besides the Fox Studios.

- 5.6 It is in reviewing the above history that I am satisfied that there were differences in degrees in separate periods and instances of exposure directing that instead of any prescribed apportionment, I should make a differential determination of the contribution with the application of some appropriate weighting. That exercise would more correctly or ideally come by a factoring of the number of and duration and intensity of the various exposures described by the Plaintiff to affect some objective fairness, as far as possible, again whilst remaining within the Standard Presumptions in the apportionment exercise. The lack of specificity means in this instance however, that this can only be by a “broad brush” approach.
- 5.7 Having found no other relevant exposure on the basis of the PSP I apportion as between the defendants sued and do not accept the submission put for NSW Land and the State at 8.2A of their Reply as to the liability of others.
6. Accordingly I proceed with the exercise of apportionment as the DDTRegs direct.

#### **Proportional role of exposure period per 4.1(ii)**

6.1 With the constraints of the broad brush approach I am nevertheless satisfied for the purposes of Clause 5(8) that it is appropriate to apply some weighting in the exercise of apportionment to have regard as best I can to the separate periods and differing nature of the exposure within the 2 defined periods to more fairly apportion responsibility.

Initially:-

- a) I find that in period 1 the Plaintiff suffered exposure to asbestos which was

heavier on the verified history than any exposure he suffered in Period 2

- b) I determine that Malabar, NSW Land and the State share responsibility for the exposure in Period 1. Absent any more precise account than this I pro rata this between the 1<sup>st</sup> (two thirds) and the balance collectively between the 2<sup>nd</sup> and 3<sup>rd</sup> in equal shares, in the 12 years of hands-on work and 8 years of other supervisory work as described in 5.2(c)

6.2 In its Reply (8.2A) the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submit as to the proportional roles of the 2 periods. More particularly:-

- a) NSW Land and the State take an approach based on the employers being Category 1 Defendants but I reject that as inconsistent with the definition in Clause 5 of the Standard Presumptions
- b) NSW Land and the State also submit Mr Reilly was exposed to asbestos outside of Periods 1 & 2. I have indicated that I find against this submission.
- c) I therefore reject their proposed apportionments at 8.2A.

6.3 In its Reply (p 13) Goss submits that:

- a) the risk to the late Mr Reilly of exposure in Period 2 in a, by then, highly regulated industry was “the possibility of exposure at all” for reasons it outlines. I accept this submission generally as reasonable and relevant subject to further considerations which I outline below.
- b) Goss also submits as to the recency of the exposure militating against causal relevance. In the absence of particular evidence directing me in that regard i.e. causality, I restrain myself to the directions of Clause 5(8).
- c) Goss submits for a “rough and ready” broad brush assessment on the basis of 3 years consistently on NSW Land sites and at least 2 years consistently on the State’s hospital sites, plus, less exactly, undisclosed periods on NSW Land and State sites (referring of course to Period 1).
- d) Goss then submits that 97.5% of the relevant exposure was in what I have called Period 1 and would have me allocate 1% of the 2.5% balance of relevant exposure in Period 2 to the State, therefore accepting <sup>1.5%</sup> 1% liability for Mr Reilly’s entitlement.

6.4 I am mindful however that Mr Reilly gives a clear account with respect to

Period 2 of “some greater exposure whilst ... working on demolition sites during this employment”. I cannot disregard this account as demonstrating Mr Reilly’s awareness of dust exposure in this period relevant to his overall load. I also have regard to the increasing responsibility on an employer as reflected in Clause 5(1) as discussed below.

## **7. Applying the Period A-C and D Apportionments per 4.1 (iii)**

7.1 Pursuant to CI 5(1) of the Standard Presumptions Category 2 Defendants (as discussed above), are responsible in an increasing proportion relative to Category 1 going forward in the defined Index Periods where determinations involve Categories 1 & 2 defendants. Whilst there are only Category 2 defendants involved in this matter I regard the Index Periods as relevant to weighting and my considerations particularly as to the otherwise lesser culpability of Goss relative to the other Category 2 Defendants earlier in time. That weighting should reflect the greater knowledge and responsibility on employers, later in time. Goss’s period i.e. Period 2 falls into Index Period D when Category 2 Defendants overtake Category 1 in responsibility.

7.2 While there is some attraction to the Goss submission on apportionment it too greatly understates in my view Mr Reilly’s own history summarised by me in 5.5 above over a significant period of employment. Having regard to this and what I view as increased responsibility on employers with the increase in knowledge reflected in the Standard Presumptions I therefore ascribe 10% of the liability to Goss.

7.3 Of the balance of 90% I ascribe 60% to Malabar and 15% each to NSW Land and the State

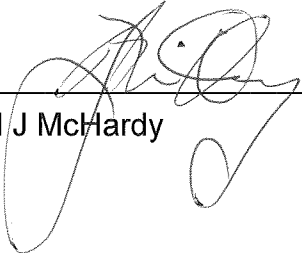
## **8. Apportionment between Defendants**

<b>Malabar</b>	<b>60%</b>
<b>NSW Land</b>	<b>15%</b>
<b>The State</b>	<b>15%</b>
<b>Goss</b>	<b>10%</b>

I accordingly assess the liability of the 4 Defendants in those proportions.

In the absence of agreement between the parties I am required pursuant to Regulation 61(3)(b) DDTRegs to appoint a Single Claims Manager. In the absence of an Appearance for Malabar and in light of the common representation for them I appoint NSW Land and the State as the Single Claims Manager.

Dated this 19th day of July 2010.

  
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Bernard J McHardy