

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

DDT No 214/11

BETWEEN: **TOMMASSO RICAPITO**
Plaintiff

AND: **GIOVENCO INDUSTRIES PTY LTD**
First Defendant / Fourth Cross-Defendant

CALTEX REFINERIES (NSW) PTY LTD
Second Defendant

CALTEX REFINERIES (NSW) PTY LTD
First Cross-Claimant

AMACA PTY LTD
First Cross-Defendant

WALLABY GRIP (BAE) PTY LIMITED
Third Cross-Defendant

AMACA PTY LIMITED
Second Cross-Claimant

CSR LIMITED
Cross-Defendant to Second Cross-Claim

GIOVENCO INDUSTRIES PTY LTD
Third Cross-Claimant

AMACA PTY LTD
First Cross-Defendant to Third Cross-Claim

CALTEX REFINERIES (NSW) PTY LTD
Second Cross-Defendant to Third Cross-Claim

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to Reg 49(1) of the *Dust Diseases Tribunal Regulations 2007* (hereinafter referred to as "the Regulations") for a determination of apportionment as between the Defendants and Cross-Defendants.
2. Regulation 47(1) of the Regulations provides that: "A reference in this Division to "a defendant" includes a reference to a cross-defendant".
3. Regulation 49(4) of the Regulations provides that I am to determine this matter on the assumption that the Defendants and Cross-Defendants are liable and I am to do so solely on the basis of the statements of particulars and replies and applying the standard presumptions.
4. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order") provides that the apportionment is to be in accordance with the Table set forth in paragraph 5(1) of the Standards Presumptions Order.

5. On 5 August 2011, Tommasso Ricapito (hereinafter referred to as "the Plaintiff") issued a Statement of Claim in the Dust Diseases Tribunal against Giovenco Industries Pty Ltd (hereinafter referred to as "Giovenco") and Caltex Refineries (NSW) Pty Ltd (hereinafter referred to as "Caltex") claiming damages arising out of his exposure to asbestos dust and fibre resulting in a claimed mesothelioma condition.
6. The Plaintiff's Statement of Claim alleges that from about 1967 until about 1972 he was employed by Giovenco at the Kurnell Oil Refinery and that in the course of his work at the Refinery he was exposed to asbestos dust and fibre. The Plaintiff alleges that Caltex was the owner and occupier of the Refinery.
7. On 18 August 2011 the Plaintiff amended his Statement of Claim to limit the period of exposure from about 1967 to about 1970.
8. On 29 September 2011 the Plaintiff filed a Statement of Particulars which, relevantly, alleges:
 - (a) That his only period of exposure to asbestos dust and fibre was while he was working, painting and coating on a full-time basis for Giovenco at the Caltex Refinery between 1967 and 1970.
 - (b) Giovenco had the contract to do the painting and coating of surfaces at the Oil Refinery owned by Caltex.
 - (c) The Plaintiff's job was to paint pipe work, boilers and other metal surfaces to prevent corrosion and wearing of the surfaces.
 - (d) Much of the pipe work and boilers were lagged with a pre-formed section in the form of half pipes which, when fitted together would fit over the pipe work.
 - (e) During periods when one or more of the boilers were shut down, most of the general maintenance work was done and this included work by ladders.
 - (f) During the shut down periods the ladders removed the old preformed lagging from the pipes or boilers by hand or with a chisel, to replace it with new lagging. When the ladders removed the old lagging it was very dusty. The ladders worked in the vicinity of where the Plaintiff worked, painting and coating. Removing the old lagging created dust that could be seen in the air and was breathed in.
 - (g) When the ladders had finished pulling the lagging from the boilers and pipes they threw the lagging on the ground and this created dust in areas where the Plaintiff worked.
 - (h) The labourers who swept up the discarded lagging created dust that the Plaintiff breathed in.
 - (i) When the maintenance work had been completed, then the ladders returned and placed the lagging back on the pipes and boilers. The Plaintiff was in the vicinity of the ladders when they put the lagging back on and they used asbestos pre-formed sections, which, on occasions, had to be cut to fit the curves and intersections of the pipe work, and a lot of dust was created when this was done.

- (j) That the Painters' workshop was close to the ladders' workshop and when the Plaintiff walked near the ladders' workshop he breathed in the dust from the workshop.
 - (k) The Plaintiff is unable to provide specific details as to the level, extent or nature of his exposure.
 - (l) To Dr Johnson he did not give any history specific to working at the Refinery, with the only history being given: "He had worked as a painter mainly doing domestic work. He had some exposure to asbestos fibro cement which he sanded".
9. On 19 October 2011, Caltex issued a Cross-Claim against Amaca Pty Ltd (hereinafter referred to as "Amaca"), Wallaby Grip Ltd (hereinafter referred to as "WGL"), Wallaby Grip (BAE) Pty Ltd (hereinafter referred to as "BAE") and Giovenco. Subsequently, Caltex discontinued the Cross-Claim against WGL. Caltex claimed contribution or indemnity from each of the Cross-Defendants.
10. On 26 October 2011, Amaca issued a Second Cross-Claim against CSR Ltd (hereafter referred to as "CSR") claiming contribution or indemnity from CSR.
11. On 7 November 2011, Giovenco issued a Cross-Claim against Amaca and Caltex, claiming indemnity and contribution. On 9 November 2011, Giovenco amended its Cross-Claim against Amaca and Caltex and joined BAE as a Cross-Defendant.

Amaca's Reply

12. On 6 December 2011, Amaca filed a Reply which, relevantly, alleged:
- (a) That the Plaintiff's term "pre-formed sections" and "lagging" are generic terms, which describe products manufactured and/or supplied by several entities.
 - (b) That Amaca does not admit to manufacturing any of the products.
 - (c) That Amaca, BAE and Caltex should be placed in Category 1 and Caltex and Giovenco should be placed in Category 2.
 - (d) That there should be a variation of the Standard Presumptions against Caltex by the maximum 20 percentage points.
 - (e) That by reason of the size, level of knowledge and failure to protect the Plaintiff from exposure to asbestos, this amounts to a basis for the variation of the Standard Presumptions against Caltex.
 - (f) That on the basis of the present material provided by the Plaintiff, Amaca has no liability at all.

- (g) Alternatively, Amaca submits that between September 1964 and June 1974 it manufactured asbestos containing insulation products in partnership with CSR and that accordingly, any liability in respect to the Plaintiff's claim should be split equally with CSR.
- (h) Amaca calculates the apportionment to be as follows:

| | |
|----------------------------------|------|
| BAE | 17% |
| Amaca | 9% |
| CSR | 9% |
| Giovenco | 14% |
| Caltex - (17% plus 14% plus 20%) | 51% |
| Total | 100% |

13. On 6th December 2011 Amaca provided a further Reply which repeated the allegations made previously but, additionally, included *McCallagh (Soltsun) v State of Queensland* (2003) DDT 3; *Berengo v Amaca Pty Ltd* (2010) VSC 496; and a letter from the Dust Diseases Board to DLA Phillips Fox dated 30 September 2009.

CSR's Reply

14. On 8 December 2011, CSR filed a Reply, which, relevantly, alleges that it is an innocent defendant in that the Plaintiff does not identify the product.
15. CSR relies upon the similar authorities referred to above.
16. Amaca, CSR, BAE should be placed in Category 1, Giovenco in Category 2 and Caltex should be classified Category 2 and also Category 1.
17. CSR asserts the following apportionment should take place:

| | |
|-------------------------|--------|
| Giovenco | 10.5% |
| Caltex | 20.25% |
| WGL (no longer a party) | 9.75% |
| BAE | 9.75% |
| Amaca | 4.875% |
| CSR | 4.875% |
| Empty Chair | 40% |

Caltex Reply

18. Caltex provided a Reply on 9 December 2011 and amended that Reply on 19 December 2011. Caltex relevantly alleges:

- (a) That there are brochures relevant to products produced by Amaca.
 - (b) That there are brochures relevant to the products of BAE.
 - (c) That by reason of the fact that BAE and Amaca use, in their advertising literature photographs of the Refinery, that this is some proof of liability.
 - (d) That an affidavit of Mario Dinnocenzo who worked for some of the periods that the Plaintiff worked at the Refinery and in particular asserts that when he worked at the Refinery the asbestos products were about 50% from James Hardie and 50% from Bells.
 - (e) Caltex:
 - (i) Admits that it operated the Refinery at Kurnell,
 - (ii) Admits that it commissioned the construction of the Refinery and the carrying out by contractors of maintenance and repair work, but that it was not responsible for the work conditions of the Plaintiff while carrying out maintenance and repair work,
 - (iii) Denies that it specified materials to be used during the maintenance and repair work;
19. Caltex asserts that Amaca, BAE, CSR should be placed in Category 1 while Giovenco and Caltex should be placed in Category 2 and that apportionment should be:

| | |
|----------|-------|
| Caltex | 17.5% |
| Giovenco | 17.5% |
| Amaca | 21% |
| BAE | 21% |
| CSR | 21% |

A submission is made as to an Empty Chair deduction

BAE Reply

20. BAE filed a Reply on 12 December which, relevantly:
- (a) Denies manufacture of asbestos sections at any time;
 - (b) Admits that it was among a number of suppliers of James Hardie 85% Magnesia High Temperature and K-lite ranges of pipe sections;
 - (c) Asserts that "lagging" is a generic term.
21. BAE asserts that:

- (a) Amaca and BAE should be placed in Category 1, while Caltex and Giovenco should be placed in Category 2;
- (b) The Standard Presumption should be varied as against Caltex on the basis of its size and sophistication.
- (c) Apportionment should be:

| | |
|----------|-----|
| Caltex | 35% |
| Giovenco | 20% |
| Amaca | 35% |
| BAE | 10% |

Giovenco's Reply

22. On 14 December 2011, Giovenco filed a Reply which relevantly alleges that:

- (a) The Plaintiff did not work directly with asbestos products;
- (b) Amaca, BAE, CSR and Caltex should be placed in Category 1 while Caltex, Giovenco should be placed in Category 2.
- (c) Caltex's apportionment as a Category 2 defendant should be increased by 15% to 50% and by reason that it was a large and sophisticated entity, which engaged directly in lagging and in maintaining its plant with asbestos.
- (d) The apportionment should be:

| | |
|----------|-------|
| Caltex | 48.4% |
| Amaca | 14.7% |
| CSR | 14.7% |
| BAE | 14.7% |
| Giovenco | 7.5% |

Additionally, there is an allegation of an Empty Chair problem.

Discussion

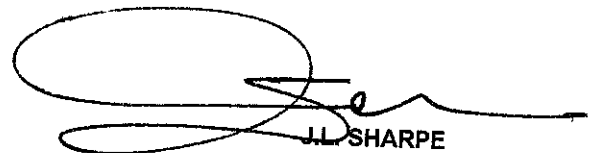
23. The difficulty of the "Empty Chair", as alleged, does not really raise itself in the present proceedings. I am called upon to determine the liability of Defendants and Cross-Defendants on the assumption that each Defendant and Cross-Defendant is liable. The condition that the Plaintiff suffers from is an indivisible one and thus he would be entitled to 100% of his verdict if he establishes liability in either the Giovenco or Caltex.

24. Accordingly, I have acted on the basis of an apportionment of the liability of the Defendants and Cross-Defendants who are joined in this action.
25. In *McCallagh (Seltsun) v State of Queensland* (2003) DDT 3, the President stated the following:

"Before I can make an assessment of any contribution which should be made to the judgment sum by the State of Queensland I must be able to find the causative potency and culpability of exposure to the products of each of JHC and Wunderlich. I am, in effect, invited to determine a proportion of an unknown proportion, and this I am unable to do. I say this with some regret, because it would have been easy enough to have obtained evidence from the Plaintiff on matters now relevant."
26. In *Berengo v Amaca* (2010 VSC 496, the learned trial judge was unable to determine the liability on the evidence that was before him.
27. Notwithstanding the decisions of *McCallagh (Seltsun) v State of Queensland* and *Berengo v Amaca Pty Ltd* (supra), I am bound to find liability in a named Defendant or Cross-Defendant.
28. However, the available material placed before me must temper the extent of such liability. It is clear from the Plaintiff's allegations that approximately half of his exposure to asbestos dust and fibre occurred when the lagging was removed and it is not clear or apparent as to the source of the lagging that was removed. In relation to the fresh lagging that was applied, given the Plaintiff's description of the type of lagging that was used, it seems that approximately half of that which was applied must be brought home to Amaca (and CSR). The other half of the newly applied lagging must be brought home to BAE (see below).
29. Initially, I must determine the existence of any separate periods of exposure pursuant to clause 5.8 of the Standard Presumptions Order. In the present case, the exposure occurred entirely within Period B during which time the division of apportionment is to be Category 1 - 65% and Category 2 - 35%.
30. Notwithstanding the submissions made to the contrary, I determine, on the basis of the Statement of Particulars and the Replies that Caltex falls into both Category 1 and Category 2.
31. I determine that Giovenco falls into Category 2.
32. I determine that Amaca, BAE and CSR fall into Category 1.
33. The next question, which arises, is whether the contribution between Category 1 and Category 2 Defendants should be varied in any way. In the present case, the Standard Presumptions take into account the various aspects of the liability of the Defendants and the Cross-Defendants and accordingly, there should be no variation in the Standard Presumptions.
34. Therefore, I determine the total liability of the Defendants and Cross-Defendants as follows:

| | | |
|-----|---|--------|
| (a) | Giovenco – 17.5% (i.e. 50% of 35%) | 17.5% |
| (b) | Caltex - 17.5% (i.e. 50% of 35%) + 32.5% (i.e. 50% of 65% in relation to old asbestos removed) + 10.84% (i.e. 1/3 of remaining 50%) | 60.84% |
| (c) | Amaca – 5.415% (i.e. ½ 33% of 50% of 65% for new asbestos installed) | 5.415% |
| (d) | BAE - 10.83% (i.e. 33% of 50% of 65% for new asbestos installed) | 10.83% |
| (e) | CSR – 5.415% (i.e. ½ 33% of 50% of 65% for new asbestos installed) | 5.415% |

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


J.L. SHARPE
Contributions Assessor

January 12, 2012