IN THE DUST DISEASES TRIBUNAL OF NEW SOUTH WALES

DDT No.175 of 2009

JAMES MALACHI RYAN
Plaintiff

STATE OF NEW SOUTH WALES
Defendant/Cross-Claimant

AMACA PTY LIMITED
First Cross-Defendant

WALLABY GRIP LIMITED
Second 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 Defendant and the Cross-Defendants.

2. Regulation 49 of the Regulations provides that the determination be of the contribution that each Defendant [and Cross-Defendant] is liable to make and such determination is to be made "solely" on the basis of the Plaintiff's Statements of Particulars and the Defendant's Replies. Additionally, standard presumptions as to apportionment are to operate subject to variations as provided.

3. Regulation 47(1) provides: "A reference in this Division to a defendant includes a reference to a cross-defendant."

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. James Malachi Ryan (hereinafter referred to as "the Plaintiff") filed a Statement of Claim on 6 July 2009 claiming provisional damages and alleges that from about 1952 to about 1960 he was employed as an apprentice boilermaker and later as a tradesman boilermaker at the Eveleigh, Chullora, Enfield and Auburn workshops of the Defendant, and that while he was so employed he was exposed to and inhaled asbestos dust and fibre.

6. The Plaintiff claims damages in respect of asbestos-related pleural disease.

7. By his Statement of Particulars, the Plaintiff alleged the following:

   (i) From about 1952 to on or about 20 April 1957 while employed by the New South Wales Government Railways he was exposed to asbestos and was not otherwise exposed to asbestos.

   (ii) During the period of his employment by the Defendant, the Plaintiff worked at a number of workshops and was exposed to asbestos.

   (iii) The level or intensity of exposure was high.

   (iv) The Plaintiff worked directly with asbestos or worked in the vicinity of others who were working with asbestos.

   (v) The Plaintiff provided a history to Dr Bryant that he was regularly involved with the maintenance of boilers insulated with asbestos. While repairing boilers he was often required to remove old asbestos insulation sometimes with a pneumatic hammer. He was also often present when lagging was being done. On several occasions the Plaintiff had to mix asbestos slurry.

   (vi) The Plaintiff provided a history to Dr Nick Saltos, namely that he had "minor exposure" to asbestos during his apprenticeship years. Additionally, he gave a history of "further exposure when mending fences, sheds etc".

   (vii) The Plaintiff provided a history to Dr Hamor of "quite significant asbestos exposure" between 1952 and 1960 while an apprentice boilermaker on the railways.

8. The Defendant issued a Cross-Claim on 30 July 2009 claiming contribution from the Cross-Defendants under the provisions of the *Law Reform (Miscellaneous Provisions) Act 1946*.

9. The Defendant filed a Reply on 1 October 2009 and relevantly alleges the following:

(i) The Defendant should be placed in Category 2 while the First Cross-Defendant, Amaca Pty Ltd (hereinafter referred to as "Amaca") should be placed in Category 1, and the Second Defendant, Wallaby Grip Ltd (hereinafter referred to as "WGL") should also be placed in Category 1.

(ii) In support of its contention that it is not a Category 1 Defendant provides the following reasons:

(a) The Defendant is sued as employer only and is not sued within the meaning of clause 5(2)(a) of the Apportionment Order and, in particular, it is not alleged that the Defendant was a miner, manufacturer, supplier or installer of asbestos or products, plant and equipment which contained asbestos.

(b) Clause 5(2)(a) of the Apportionment Order refers to Defendants who "engage in a business" and it is alleged that the State did not engage in a business.

(c) The Defendant did not "engage" with another person to install plant and therefore did not "engage in a business" within the meaning of clause 5(2)(a).

(d) Footnote 11 to clause 5(2) does not apply to the Defendant.

(e) There is a real distinction between Category 1 Defendants and, accordingly, the Defendant should not be characterised as both a Category 1 Defendant and a Category 2 Defendant.

(iii) The Defendant as a Category 2 Defendant had actual knowledge and that both Amaca and WGL had actual knowledge.

(iv) The standard presumption should be varied only if the Defendant is found to be a Category 1 Defendant.

(v) In the period 1950-1955 in accordance with the decision of *Woelfl* the apportionment should be Defendant 30%, Amaca 50%, WGL 20%.

(vi) If the Defendant is a Category 1 Defendant, then there should be a variation.

(vii) If the Defendant is a Category 2 Defendant, then the apportionment should be 25% to the State, 37.5% to WGL and 37.5% to Amaca.

(viii) If the Defendant is a Category 1 Defendant and a Category 2 Defendant, then the apportionment should be Defendant 30%, WGL 35% and Amaca 35%.

10. Amaca filed a Reply on 24 August 2009 and, so far as is relevant, alleges:

(i) The Plaintiff has not identified any products manufactured or supplied by Amaca.

(ii) The terms "asbestos lagging insulation", "raw asbestos powder" and "asbestos slurry" are generic terms, which describe products manufactured and/or supplied by several manufacturers.

(iii) Amaca first became aware during the mid-1950s as to the dangers of inhalation of asbestos fibre.

(iv) The Defendant, Amaca and WGL should be placed in Category 1 and the Defendant should also be placed in Category 2.

(v) The standard presumption should be varied by the maximum percentage points, 20%, against the Defendant.

(vi) WGL had actual knowledge.

11. WGL, filed a Reply on 7 October 2009 which, so far as is relevant, alleges:

(i) WGL was one of a number of manufacturers and suppliers of asbestos composition in the relevant period.

(ii) Amaca were also manufacturers and suppliers of asbestos composition in the relevant period.

(iii) During the relevant period WGL did not have actual knowledge.

(iv) Amaca, WGL and the Defendant should each be placed in Category 1.

(v) Additionally, the Defendant should be placed in Category 2.

(vi) The standard presumptions ought to be varied in relation to the Defendant and such variation should be by 20 percentage points.

12. While it is true that the Plaintiff does not nominate any of the products of Amaca or WGL by reason of the Regulations, I am bound to assume that each Defendant and Cross-Defendant is liable.

13. In accordance with clause 5(8), I must first make a determination of any separate periods of exposure with reference to the duration and the intensity of exposure to asbestos in each period. In the present case, it is clear that there is one period of exposure while the Plaintiff was employed by the Defendant and that during that period the intensity of exposure was the same during the whole of the period of the exposure. There was also

exposure of a domestic nature, but for the purposes of this determination I am unable to determine the extent, duration or intensity of such exposure [if any].

14. The period of the Plaintiff's employment by the Defendant falls entirely within period A of the standard presumptions order and, accordingly, Category 1 Defendants are to be apportioned 75% and Category 2 Defendants 25% with a variation of up to 20 percentage points.

15. I determine on the basis of the Statement of Particulars and the replies of the Defendant and Amaca and WGL, the Defendant falls into both Category 1 and Category 2, given that the Defendant comes within the terms "Corporations, authorities and legal entities" and where the term "business" is used, it clearly encompasses the Defendant's operations.

16. Insofar as Amaca is concerned, I note the submissions as to the claimed lack of particulars relating to their products but, notwithstanding this fact, I determine that Amaca did supply its products to the Defendant and that, as between Amaca and WGL, the supply of asbestos materials was approximately equal.

17. Insofar as Category 1 Defendants are concerned, the liability of each should be divided equally.

18. In the present case, the standard presumptions take into account the various aspects of the liability of the Defendant and Amaca and WGL, and accordingly there should be no variation in the standard presumptions.

19. Thus, the following calculation as to liability can be made:

    (i) The Defendant bears one-third of the 75% as Category 1 Defendant + 25% as a Category 2 Defendant, and thus is liable for a total of 50%.
    (ii) Amaca is liable for one-third of the 75% as a Category 1 Defendant and thus liable to 25%.
    (iii) WGL is liable for one-third of the 75% and is thus liable for a total of 25%.

20. I therefore determine the total liability of the Defendant and the Cross-Defendants as follows:

(i)	Defendant	50%
(ii)	Amaca	25%
(iii)	WGL	25%
	Total	100%

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

J.L. SHARPE
Contributions Assessor

28 October 2009