

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No 141/2010

BETWEEN: **GRAHAM SAMUELS**
 Plaintiff

AND: **AMACA PTY LIMITED**
 Second Defendant

AND: **JEMENA LIMITED**
 Third 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 (hereinafter referred to as "the Regulations") for a determination of apportionment as between the Defendants.
2. Regulation 49 of the Regulations provides that I am to determine the contribution that each Defendant is likely to make on the assumption that the each of the Defendants are liable and solely on the basis of:
 - "(a) the statement of particulars and the defendants' replies to the claim; and
 - (b) the standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette."
3. 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.
4. On 31 May 2010 the Plaintiff filed a Statement of Claim in the Dust Diseases Tribunal claiming provisional damages in respect of asbestosis, asbestos-related pleural disease, asbestos pleural plaques and asbestos-related diffuse pleural thickening. The Plaintiff's alleged conditions are divisible conditions.

5. The Statement of Claim alleges:
- (i) From a date in about 1963 to a date in about 1968 (i.e. a period of about 5 years) the Plaintiff was employed by AGL Energy Ltd as an apprentice plumber and drainer and, in the course of such employment, was exposed to asbestos dust and fibre.
 - (ii) Between 1969 and August 1985 (i.e. a period of about 16 years) the Plaintiff was employed and self-employed as a plumber carrying out plumbing work at various areas in Australia and in the course of that employment was exposed to asbestos dust and fibre emanating from asbestos products manufactured by Amaca Pty Ltd (hereinafter referred to as "Amaca").
6. In support of the Plaintiff's Statement of Claim, a Statement of Particulars was filed on 26 June 2010 which relevant alleged:
- (i) Between 1963 and 1968 he was employed by Australian Gaslight Company for a 5 year apprenticeship and was exposed to asbestos dust and fibre which included asbestos dust and fibre emanating from products of Amaca.
 - (ii) Between 1969 and 1971 the Plaintiff was employed by Stewart Samuels & Turner as a building plumber and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
 - (iii) Between March 1972 and May 1972 the Plaintiff was employed by Fricker Bros Adelaide as a plumber, drainer and gas fitter and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
 - (iv) Between May 1972 and December 1972 the Plaintiff was employed by Watts Bros Hobart as a plumber and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
 - (v) Between January 1973 and June 1973 the Plaintiff was employed by Fricker Bros Adelaide as a plumber, drainer and gas fitter and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.

- (vi) Between June 1973 and December 1973 the Plaintiff was employed by the partnership conducted by Bob Allen as a plumber and drainer and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (vii) Between January 1974 and June 1974 the Plaintiff was employed by Fricker Bros Adelaide as a plumber, drainer and gas fitter and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (viii) Between July 1974 and July 1975 the Plaintiff was employed by Stewart Samuels & Turner as a building plumber and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (ix) Between July 1975 and September 1976 the Plaintiff was employed by various plumbing groups in Perth and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (x) Between October 1976 and August 1980 the Plaintiff was employed by G&R Plumbing Perth as a plumber, drainer and gas fitter and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (xi) Between September 1980 and June 1981 the Plaintiff was employed by Dalby Town Council as a plumbing inspector and in the course of such employment was exposed to asbestos dust and fibre. (There is no allegation of any product of Amaca being involved in this period of time.
- (xii) Between July 1981 and December 2003 the Plaintiff was employed by Albert Shire Council as a plumber and drainer, and after about 7 months became a plumbing inspector, and in the course of such employment was exposed to asbestos dust and fibre. (In this period, there is no allegation that the Plaintiff was exposed to the Amaca's products.)
- (xiii) Between January 1985 and August 1985 the Plaintiff was employed by Keith Nash Plumbing as a plumber and drainer and in the course of such employment was exposed to asbestos dust and fibre, including exposure to the products of Amaca.
- (xiv) Between September 1986 and December 1986 the Plaintiff was employed by Stuart Holme School as a maintenance plumber and in the course of such

employment was exposed to asbestos dust and fibre (minimal). There is no allegation of being exposed to any product of Amaca.

- (xv) Between January 1986 and September 1986 the Plaintiff was a pipe bender and welder with Evans Deacon where there was possible exposure to asbestos dust and fibre.
- (xvi) Between September 1987 and September 1988 the Plaintiff was employed by Frank Hole Plumbing as a plumber, drainer and gas fitter and in the course of such employment there was minimal exposure to asbestos dust and fibre. (There is no reference to exposure to any product of Amaca.)
- (xvii) Between September 1988 and September 1991 the Plaintiff was employed by Queensland Plumbing, Brisbane as a plumber, drainer and gas fitter and in the course of such employment was exposed to asbestos dust and fibre (minimal). (There is suggestion of being exposed to any product of Amaca.)
- (xviii) The Plaintiff alleges that he had constant regular exposure to asbestos products manufactured by Amaca.
- (xix) The Plaintiff alleges that his exposure to asbestos went from the start of his employment with Australian Gaslight Company in Sydney up to the mid-1980s after which his exposure was trivial and that virtually all of his asbestos exposure came from Amaca's products.
- (xx) The Plaintiff estimates that during his work at Australian Gaslight Company he had 20% of his lifetime exposure to asbestos "although not all, would have come from "Amaca" products".
- (xxi) The Plaintiff identifies certain products of Amaca, namely Super 6, Hardiflex, asbestos flue pipes, asbestos powder, asbestos cement pipe.
- (xxii) The Plaintiff estimates that his last exposure to an Amaca product would have been August 1985.

7. On 18 October 2010 the Plaintiff amended his Statement of Claim by deleting all reference to AGL Energy Ltd and proceeding against Jemena Ltd (hereinafter referred to a "Jemena") and alleged that Jemena had assumed the liability of Australian Gaslight Company from 1963 to 1968.

8. On 13 December 2010 Amaca filed a Reply which, *inter alia*, alleges:

- (i) It admits it manufactured Super 6, Hardiflex and asbestos flue pipes.

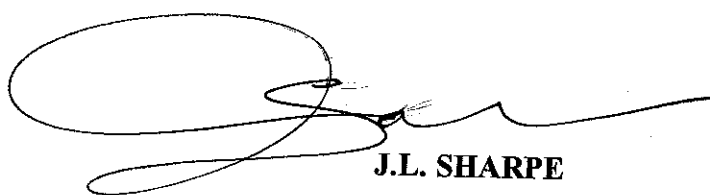
- (ii) Between 1964 and 1974 it manufactured Hardie-BI Company 85% Magnesia and K-Lite sections with CSR Ltd pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd.
 - (iii) Between 1945 and 1964 and from 1964 to 1974 it manufactured Hardie-BI Company 85% Magnesia blocks, sections and plastic composition in partnership with CSR Ltd pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd. Amaca says that it ceased manufacturing insulation products in 1974.
 - (iv) Amaca denies manufacturing the asbestos powder to which the Plaintiff has referred.
 - (v) Amaca should be Category 1 and Jemena Ltd should be Category 2.
 - (vi) The standard presumption should be varied with the end result that Jemena should be liable for 50% of the exposure in its period but that variation must be allowed for asbestos powder not manufactured by Amaca and that, accordingly, Jemena should have 8% and Amaca 2% plus 10% for Jemena on the basis of 50% of 20%.
 - (vii) Thus, Amaca concludes 82% and Jemena 18%.
9. On 9 December 2010 Jemena filed a Reply which, *inter alia*, alleges:
- (i) Amaca should be placed in Category 1 and Jemena in Category 2.
 - (ii) The Plaintiff alleges exposure in two distinct periods in the Amended Statement of Claim and at least 12 distinct periods in the Form 1 particulars.
 - (iii) The periods in the Amended Statement of Claim are 1963-1968 wherein Amaca and Jemena are implicated and 1959 to August 1965 where only Amaca is implicated.
 - (iv) The period 1960-1968 falls into Index Period B under the order.
 - (v) The standard presumptions should be varied, given the fact that Amaca was a major manufacturer and supplier of asbestos products while Jemena was only a Category 2 Defendant, but at the same time there should be no variation of the Standard Presumptions on account of the identity, capacity, size, state of sophistication, non-delegable duty, actual knowledge or ready access to resources of Jemena.
 - (vi) The maximum variation of 20% should be applied to its Category 2 Defendant share.

- (vii) Jemena relies upon the authority of *State Rail Authority of New South Wales v Wallaby Grip Ltd* (1999) NSWDDT 8 at paragraphs 109 and 112 to the effect that Amaca had actual knowledge.
 - (viii) In addition, Jemena relies on the Plaintiff's assertion that 20% of his lifetime exposure occurred with Jemena's predecessor and that "most of the exposure in that employment, although not all, would have come [from] James Hardie products".
 - (ix) On Jemena's calculation, the end result should be Amaca 96% and Jemena 4%.
10. 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 intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relevant contributions simply on the basis of the elapsed years between the various periods of exposure.
11. Based on the material available to me, I determine the contribution between the two periods to be:
- (i) The period of employment whilst employed by Jemena Ltd accounts for 20% of the Plaintiff's total exposure. Of which 70% involves exposure to Amaca's products, with the balance of 30% not involving Amaca products).
 - (ii) The period not employed by Jemena Pty Ltd accounts for 80% of the Plaintiff's total exposure (but of this only 70% may be attributable to Amaca products given the allegations made by Amaca as to powder).
12. Obviously there arises approximately 30% of the 80% of the Plaintiff's total exposure for which Amaca may not be responsible. However, as this contribution assessment can only deal with the contribution each Defendant must make to the Plaintiff's claim I can make no allowance in regard to the vacant chair.

13. In respect of the period of employment with Jemena, this falls within period B of the Standard Presumptions Order and thus the Category 1 Defendants are presumed to be 65% liable and the Category 2 Defendants 35% liable.
14. I determine that Amaca falls into Category 1 and Jemena falls into Category 2.
15. In relation to the period of exposure with Jemena Ltd, I determine that 70% of that exposure occurred to the products of Amaca with a balance of 30% to other manufacturers or suppliers.
16. In the present case, the standard presumptions take into account the various aspects of the liability of Amaca and Jemena Ltd and, accordingly, there should be no variation of the Standard Presumptions.
17. Thus, the following calculations as to liability can be made:
 - (i) Jemena bears 30% of the 20% on its own (i.e. 6%), and 35% of the 70% of the 20% (4.9%) and thus a total of 10.9%.
 - (ii) Amaca is liable for 65% of 70% of the 20% total exposure (Jemena period) (9.1%), and 100% of 80% of the remaining period.
18. Therefore, I determine the total liability of the Defendants as follows:

Jemena Ltd	10.9%
Amaca	89.1%
Total	100%

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



J.L. SHARPE
Contributions Assessor

15 December 2010