

IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES

DDT NO. 302/2009 and 302/2009/1

ALLAN WALTER SCHWARZE  
Plaintiff

WALLABY GRIP LIMITED  
First Defendant

WALLABY GRIP (BAE) PTY LIMITED (IN LIQUIDATION)  
Second Defendant

BURNS, PHILP & COMPANY PTY LIMITED T/AS MBT ENGINEERING  
FABRICATIONS  
Third Defendant

CONTRIBUTIONS ASSESSMENT  
DETERMINATION

The plaintiff, Allan Walter Schwarze, sues the first defendant, Wallaby Grip Limited ("WGL"), the second defendant Wallaby Grip (BAE) Pty Limited (in liquidation) ("BAE") and the third defendant, his alleged former employer, Burns Philp & Company Limited (trading as MBT Engineering Fabrications) ("BPC" and "MBT" respectively) seeking damages for personal injuries as a result of exposure to asbestos as more fully discussed later.

A single Reply has been filed on behalf of WGL and BAE. In that Reply it is asserted that WGL and BAE did not operate simultaneously and should be treated as a single entity for the purpose of calculating apportionment of liability. There is no obvious reason that course ought not be followed. (The single entity will be referred to as "Wallaby Grip".)

Wallaby Grip has issued a cross-claim against three cross-defendants being Amaca Pty Limited (Under NSW Administered Winding Up) ("Amaca"), CSR Limited ("CSR") and Bradford Insulation Industries Pty Limited ("BII").

The cross-defendants have each filed Replies.

The plaintiff alleges that as a result of his exposure to asbestos he contracted injuries alleged as, inter alia, mesothelioma which is the medical condition alleged in the plaintiff's Statement of Particulars ("the Particulars").

Mesothelioma is an "indivisible disease" within the meaning of clause 5(7) of the *Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007* (hereinafter called "the Order").

The Registrar of the Dust Diseases Tribunal has appointed me as Contributions Assessor pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulations") and I have been asked to appoint a Single Claims Manager.

#### **The Task of the Contributions Assessor**

The task of a Contributions Assessor is set out in clause 49(4) of the Regulations which is in the following terms:-

"(4) *The Contributions Assessor to whom a matter is referred is to determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:*

*(a the plaintiff's statement of particulars and the defendants' replies on the claim,*

and

(b) *standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette.*"

The plaintiff's Statement of Particulars is hereinafter called "the particulars".

Clause 49(4) of the Regulations is included in Part 4 Division 5 of the Regulations as is clause 47(1) which provides that "A reference in this Division to a defendant includes a reference to a cross-defendant". Accordingly the contents of the Replies of cross-defendants are taken into account in the same way as are Replies by defendants. In addition the assumption that defendants are liable extends to an assumption that cross-defendants are liable.

The standard presumptions become relevant in circumstances where there are different categories of defendants (as to which see clause 5(2) of the Order) in the proceedings. This aspect will be mentioned later.

#### **The Plaintiff's Employment**

Paragraphs 4 and 5 of the Amended Statement of Claim allege:

"4 The plaintiff was employed by Mauri Brothers & Thompson (Engineers) Pty Limited as a copper smith apprentice, fitter, welder and welding supervisor, at various sites in New South Wales, from, on or about 21 April 1953 until an unknown date, at which time the Plaintiff continued to be employed by the

*Third Defendant under the same conditions, until on or about 12 June 1998.*

5 *At all material times, the Third Defendant assumed all responsibilities and liabilities in respect of the Plaintiff's employment from, on or about 21 April 1953 until on or about 12 June 1988."*

BPC admits in paragraph 3.1 of its Reply that it employed the plaintiff immediately prior to the termination of his employment on 12 June 1998. Nothing turns on the different dates mentioned in paragraphs 4 and 5.

The plaintiff's allegation that BPC "assumed that all responsibilities and liabilities in respect of the plaintiff's employment from, on or about 21 April 1953 until on or about 12 June 1988" is disputed by BPC which alleges that it acquired MBT some time between 1982 and 1985.

A Contributions Assessor is required to assume that the defendants are liable. Accordingly this determination must proceed on the assumption that the third defendant, BPC, is liable as employer of the plaintiff as alleged.

#### **Plaintiff's Allegations of Exposure to Asbestos**

By way of general description of his exposure to asbestos, the plaintiff says in the Particulars that he was exposed to asbestos "Daily" (paragraph 4.5). He describes the level or intensity of his exposure to asbestos as being "High from approximately 1953 until early 1970, Medium from approximately 1970 to late 1988 and Low from approximately 1988 to 1998" (paragraph 4.6).

He says that his exposure took place at "Various locations across Sydney, including but not limited to sites in Bourke St, Waterloo, Milperra, Moorebank, Broadway and surrounding areas" (paragraph 4.3). He said he was "Unsure" who owned the premises where exposure occurred (paragraph 4.4).

The plaintiff answers the question "How were you exposed to asbestos?" in paragraph 4.1. Therein he describes the work he did and where he did it (including at premises not mentioned in paragraph 4.3). Importantly, bearing in mind the task of a Contributions Assessor, he says that:-

*"From approximately 1953 until the late 1980's I was regularly exposed to asbestos. During that time I was sent to many different locations, which would almost always expose me to some form of asbestos insulation."*

He goes on to describe specific tasks in which he was involved. He mentions specific items and materials with which he worked and which contained asbestos. Not only was he exposed to asbestos as a result of the work he was doing himself, he also gives instances of being in the vicinity of other people who were working with asbestos to which he was exposed.

The overall impression to be gleaned and from the contents of paragraph 4.1 is that the plaintiff, in the course of his employment, was exposed to asbestos which formed part of the plant and equipment in premises where he worked and that he variously removed and/or maintained and/or installed asbestos products. In the doing of that work he used various asbestos products.

The description as given does not enable one to distinguish between the nature, extent or intensity of the exposure in any

one or other of the activities he describes; that is to say, one cannot determine with any level of confidence or accuracy whether the nature, extent or intensity of the exposure to asbestos varied between the activities of removal and/or maintenance and/or installation of asbestos products. Neither can one distinguish between the nature, extent and/or intensity of exposure as between the different asbestos products.

However, one is able to determine that the installation of asbestos products was a not insignificant part of the employment duties of the plaintiff in the course of his employment. The fact that he is "Unsure" of who owned the premises nominated leads me to infer that not all of the premises where he did his work were his employer's premises. In the circumstances one infers that he was engaged in installation of asbestos for his employer apparently as part of a business carried on by his employer.

Although the plaintiff said his exposure to asbestos was "Low from approximately 1988 to 1998" he also answered the question (paragraph 4.26) "What was the date of your last exposure to asbestos, if this was not your last day of employment?" by saying "Sometime during the late 1980's". To my mind the combined effect of these, and other earlier, answers is that any exposure to asbestos after 1988 was of no significance and I make that determination.

Clause 5(8) of the Order requires, in the case of an indivisible disease, that the apportionment "will apply to the whole of the claim unless the Contributions Assessor is satisfied that by reference to the existence of separate periods of exposure, a differential determination of the contribution of each such exposure period ought be made".

Doing the best I can, I determine the period of high exposure to asbestos (being the period from 23 April 1953 to early 1970 which I determine to be 31 April 1970) to be a period in which the plaintiff experienced 65% of his exposure to asbestos and the period thereafter until "late 1988" (which I determine to be 31 December 1988) to be a period in which the plaintiff suffered 35% of his exposure to asbestos. The two periods will be called "the first period" and "the second period" respectively.

### **Replies, Cross-Claims and Replies to Cross-Claims**

The Cross-Claim filed for Wallaby Grip (for WGL and BAE) seeks contribution and/or indemnity from Amaca (as a sole entity) and from Amaca, CSR and BII as partners (collectively hereinafter called "the partnership"). In that sense I determine that there are two cross-defendants being the sole entity and the partnership.

The partnership agreement was dated 24 September 1964. Thereafter Amaca and CSR manufactured asbestos products which were distributed by BII. This arrangement came to an end in May 1974. The fact that the partnership came to an end does not alter the fact that the partnership's asbestos products continued in existence wherever they had been installed and the partnership's liability for those products therefore continued.

To the extent that the plaintiff was exposed to asbestos manufactured and distributed by the partnership, I determine that each partner is liable for one third of the extent of the liability for partnership products.

In paragraph 4.8 of the Particulars the plaintiff nominates asbestos products to which he says he was exposed. He says

that those asbestos products were manufactured and/or supplied by Bestobell/Bells Asbestos and Engineering.

The cross-claimants (WGL and BAE) allege the cross-defendants are liable and I am required to assume that they are liable. Assuming the cross-defendants are liable, it seems to me that the fact that the plaintiff has identified only the cross-claimants' products is not sufficient to enable or require a differentiation of liability as between cross-claimants and cross defendants.

In summary, I determine that the defendants between which liability is to be apportioned are Wallaby Grip, Amaca and the partnership.

#### **Index Periods**

The plaintiff's exposure to asbestos commenced on 23 April 1953 and his last exposure has been determined to be 31 December 1988 which period will be called "the whole period".

The whole period encompasses Index Period A (before 1 January 1961), Index Period B (from 1 January 1961 to 31 December 1978) and index Period C.

During Index Period A the defendants liable are BPC, Wallaby Grip and Amaca.

From the commencement of Index Period B until 23 September 1964, the defendants liable are BPC, Wallaby Grip and Amaca.

From 24 September 1964 for the remainder of Index Period B

(being 3 years and 9 months; [rounded] at 45 months) and for all of Index period C the defendants liable are BPC, Wallaby Grip, Amaca and the partnership.

The first period comprises (rounded) 17 years (204 months) and the second period 18 years and 8 months (224 months).

The monthly rate at which liability accumulated during the first period (65/204 months) was 0.3186% (which will require a small amount of rounding) and during the second period the monthly rate (35/224 months) was 0.1562%.

### **Categories of Defendants**

I determine that BPC is a Category 1 defendant within the meaning of clause 5(2) of the Order in that it was an installer.

All defendants relevantly accept/agree that WGL, BAE, Amaca, CSR and BII are Category 1 defendants.

BPC was the employer of the plaintiff. As such it is a Category 2 defendant. As required by clause 5(3) of the Order, a separate percentage share will be calculated for BPC for its role in each category.

### **Standard Presumptions**

During Index period A the standard presumptions provide for an apportionment as between categories of defendants in the ratio of 75:25; ie 75% for Category 1 defendants and 25% for Category 2 defendants.

The ratio provided for in Index Period B is 65%; 35% as between Category 1 and Category 2 defendants while the relevant ratio in Index Period C is 60%:40%.

Taking an overall view I am not satisfied that the standard presumptions ought be varied as clause 5(5) of the Order contemplates might happen.

### **Calculations**

Index Period A spans a period of 7 years and 8 months; 92 months. The percentage liability accumulated over 92 months ( $92 \times 0.3186$ ) is 29.3%.

There are 3 Category 1 defendants being BPC, Wallaby Grip and Amaca. BPC is also a Category 2 defendant.

In order to maintain the ratio (75:25) between categories of defendant, each Category 1 defendant is determined to be liable for 8.8% with the Category 2 defendant being liable for 2.9%; ie BPC 8.8%, Wallaby Grip 8.8%, Amaca 8.8% and BPC 2.9%.

Index Period B between 1 January 1961 and 23 September 1964 spans 3 years 9 months; 45 months during which there were the same 3 Category 1 defendants and the same Category 2 defendant with ratio between defendants being 65:35. Liability accumulated over 45 months ( $45 \times 0.3186$ ) is 14.3%.

To maintain the 65:35 ratio, each Category 1 defendant is liable for 4.04% with the Category 2 defendant being liable for 2.18%; ie BPC 4.04%, Wallaby Grip 4.04%, Amaca 4.04% and BPC 2.18%.

Still during Index Period B, for the period 24 September 1964 until 30 April 1970 (5 years and 7 months; 67 months), there are 4 Category 1 defendants and 1 Category 2 defendant. Over that period the liability which accumulated ( $67 \times 0.3186$ ) was 21.3% with the ratio between categories of defendants being 65:35.

For this period, each Category 1 defendant will be liable for 4.69% with the Category 2 defendant being liable for 2.54%; ie BPC 4.69%, Wallaby Grip 4.69%, Amaca 4.69%, the partnership 4.69% (Amaca 1.57%, CSR 1.56% and BII 1.56) and BPC 2.54%.

After 1 May 1970, the monthly rate at which liability accumulated was 0.1562%. Therefore, liability for the remaining part of Index Period B, namely 1 May 1970 until 31 December 1978 (8 years and 7 months; 105 months) is 16.40% which, while maintaining Index Period B (65:35) ratio means each of the 4 Category 1 defendants is liable for 3.61% with the Category 2 defendant liable for 1.96%; ie BPC 3.61%, Wallaby Grip 3.61%, Amaca 3.61%, the partnership 3.61% (Amaca 1.2%, CSR 1.21% and BII 1.2%) and BPC 1.96%.

During Index Period C liability continued to accumulate at the monthly rate of 0.1562% with the result that during the period 1 January 1979 until 31 December 1988 (10 years; 120 months) the percentage of liability accumulated ( $120 \times 0.1562$ ) is 18.7%.

Shared between the 4 Category 1 defendants and the only Category 2 defendant and maintaining the ratio of 60:40 for Index period C, each Category 1 defendant is liable for 4% and the Category 2 defendant is liable for 2.7%; ie BPC 4%, Wallaby Grip 4%, Amaca 4%, the partnership 4% (Amaca 1.33, CSR 1.33 and BII 1.34) and BPC 2.7%

All of these calculations have required some rounding.

### Conclusion

BPC is determined to be liable for  $[8.8 + 2.9 + 4.04 + 2.18 + 4.69 + 2.54 + 3.61 + 1.96 + 4 + 2.7]$  37.42%.

Wallaby Grip  $[8.8 + 4.04 + 4.69 + 3.61 + 4]$  25.14%.

Amaca  $[8.8 + 4.04 + 4.69 + 1.57 + 3.61 + 1.2 + 4 + 1.33]$   
29.24%.

CSR  $[1.56 + 1.21 + 1.33]$  4.1%.

BII  $[1.56 + 1.2 + 1.34]$  4.1%.

I appoint BPC as Single Claims Manager.

Dated: 6<sup>th</sup> July 2010



**Peter O'Connor**

Contributions Assessor