

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 324 of 2010, 324 of 2010/CC1, 324 of 2010/CC2

James Colin Smith

Plaintiff

Eraring Energy

Defendant/Cross Claimant

AND

Ten Cross Defendants

DETERMINATION

INTRODUCTION

By letter dated 9 August 2011 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal that contains the following material upon which I rely in making this determination:

1. Plaintiff's Statement of Particulars ("Particulars")
2. Defendant's Reply
3. Defendants Amended Reply
4. Reply filed by BIL
5. Reply filed by BAL
6. Reply filed by Rolls Royce
7. Reply filed by Alstom
8. Reply filed by Amaca
9. Reply filed by WGL, NSW, BAE
10. Reply filed by CSR

In addition to the material described at 1-10 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

The Plaintiff is a 71 year old male who has allegedly contracted asbestos related pleural disease. I assume that the Defendant and each of the Cross Defendants are liable to contribute to damages to which the Plaintiff may be entitled. I am required to make this assumption unless the Defendant and each of the Cross Defendants agree that one or more of them is an “innocent defendant.” I will refer to the Defendant and Cross Defendants in the following way:

- Defendant – Eraring
- Babcock International Limited - BIL
- Babcock Australia Limited – BAL
- Rolls Royce Limited – Rolls Royce
- Power Technologies Pty Ltd – Power Tech
- Alstom Pty Ltd – Alstom
- Amaca Pty Ltd – Amaca
- Wallaby Grip Limited – WGL
- Wallaby Grip (BAE) Pty Ltd – BAE
- Wallaby Grip (NSW) Pty Ltd - NSW

CATEGORY OF DEFENDANTS

I consider that Eraring should be categorised as both a Category 1 Defendant as an installer of asbestos and a Category 2 Defendant as the Plaintiff’s employer. Eraring argues against this

proposition but it is clear to me from material attached to the Reply filed on behalf of WGL, NSW, and BAE that this is the proper approach and consistent with the Standard Presumptions.

Eraring seeks to have Power Tech and Alstom placed in Category 1 and Category 2 on the grounds that these entities were both “installers” and occupiers. I am not satisfied on the material contained in the Eraring Reply that this is the proper approach.

Therefore Each Defendant is in Category 1 save for Eraring which is in Category 1 and Category 2.

PLAINTIFF’S ALLEGATIONS OF EXPOSURE

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the Plaintiff’s respiratory system of asbestos dust and fibre.

It is important to recount with precision the Plaintiff’s alleged exposure.

He commenced with Eraring on 17 July 1963 at the Wangi Power Station as an electrical fitter. He was engaged in the maintenance and repair of electrical systems throughout the power station. He handled switch guards that contained asbestos but most of his exposure occurred as a result of working in close proximity to other workers who were removing and replacing asbestos during routine maintenance work. He specifically recalls composition that was mixed with water

to form a slurry. He also recalls the use of half pipe sections, pre formed blocks and rope. He was exposed during the removal of old lagging and the application of new insulation.

He says one of the turbines and one of the boilers were shut down for annual maintenance and overhaul. This task took a number of weeks as most of the insulation was removed and then replaced.

He was promoted to assistant power plant operator and his employment was transferred to Wallerawang Power Station on 1 November 1965 after a short period of training at Pymont and at Wallerawang. Although his role changed slightly he continued to be exposed in much the same way as when he was employed at Wangi Power Station.

On 3 October 1967 the plaintiff was transferred to Munmorah Power Station where he continued to work as an assistant power plant operator until 5 August 1977 when he was promoted to power plant operator. He is not specific about how his exposure occurred at Munmorah but I interpret that it was similar to at Wallerawang. He refers to the control room being sprayed with limpit asbestos but I am not sure of the significance of this reference.

The plaintiff says that he continued to be exposed after 5 August 1977 up until 1 July 1981 but that most of his exposure occurred between 1963 and 1977. He seems to say that his exposure from 5 August 1977 until 1 July 1981 was limited to exposure consequent upon annual overhaul and maintenance programmes.

DEFENDANT'S REPLIES

All of the Replies filed by the Defendants have been helpful and most of them extremely detailed in their analysis of how contribution should be determined. Each makes a cogent and well constructed argument as to why its liability should be reduced. At the risk of not doing the arguments and contentions their due I will summarise the main arguments made in each Reply in the following sections.

Eraring

- Its claim against (i) BIL, BAL is as designer and constructor of boilers at Wangi Power Station, (ii) Power Tech is as designer and constructor of boilers at Munmorah Power Station, (iii) Alstom is as designer and constructor of turbines at Munmorah Power Station, (iv) Rolls Royce is as designer and constructor of boilers at Wallerawang Power Station, (v) Amaca and NSW is as supplier of insulation for boilers and turbines at Wangi Power Station, Wallerawang Power Station, and Munmorah Power Station, (vi) WGL is as supplier of insulation for boilers and turbines at Wangi Power Station and Wallerawang Power Station, (vii) BAE is as supplier of insulation for boilers and turbines at Munmorah Power Station
- It admits ownership and control of the three Power Stations but says that during various periods the power stations were occupied by Rolls Royce, Power Tech and Alstom
- It had no actual knowledge of the dangers of asbestos prior to 1970 but had constructive knowledge of the dangers of asbestos at all times material to the plaintiff's claim.

- It implemented safety measure at times relevant to the plaintiff's claim including cleaning and ventilation and the issue of asbestos safety guidelines in 1974
- It is not properly regarded as an installer
- The Standard Presumptions should be varied against Amaca due to its size and sophistication and the state and extent of its actual knowledge of the dangers of asbestos
- The plaintiff's exposure should be divided into three periods being Wangi power Station 27 months, 16% of the total, Wallerawang Power Station, 23 months being 13.5% of the total, Munmorah Power Station, 120 months being 70.5% of the total, this period ceasing in August 1977 on a proper reading of the plaintiffs particulars

Amaca

- By its Cross Claim against CSR it is entitled to contribution of 50% consequent upon manufacture or supply of products for the period from September 1964 to May 1974 and that its liability should be shared equally with CSR
- The Standard Presumptions should be varied up by 20% against Alstom, Rolls Royce and Eraring.
- It can only be liable for exposure occurring at the Munmorah Power Station given that this is the only allegation contained in Eraring's Cross Claim (this is satisfactorily addressed in Eraring's Amended Reply)
- The plaintiff's exposure of 225 months should be divided into three periods being Wangi Power Station 28 months, 13% of the total, Wallerawang Power Station, 32 months being 14% of the total, Munmorah Power Station, 165 months being 73% of the total.

CSR

- It is an innocent defendant because of the absence of evidence of exposure to Hardie/BI Partnership products
- Eraring and Alstom are Category 1 and Category 2 Defendants

WGL, NSW, BAE

- WGL ceased operations in 30 September 1966
- WGL is sued only for the Wangi Power Station period
- BAE is sued only for the Munmorah Power Station period
- NSW is sued for the exposure at each power station but it commenced operations in January 1967 and ceased on 30 June 1974
- WGL, BAE and NSW should be treated as one entity
- Warnings were displayed on products from the mid 1970s
- Eraring is a Category 1 and Category 2 Defendant.
- The Standard Presumptions should be varied against Eraring to take account of its actual knowledge from 1964
- The Standard Presumptions should be varied against BIL in the light of *Royal*
- The Standard Presumptions should be varied against Eraring in its capacity as a Category 2 Defendant due its size and sophistication

- The Standard Presumptions should be varied against Rolls Royce in the light of Hay and because of its size and sophistication
- The Standard Presumptions should be varied against Alstom because of the size and sophistication of its UK parent company
- The Standard Presumptions should be varied against Amaca in the light of Hay
- The Standard Presumptions should be varied against CSR in the light of Wren

Rolls Royce

- It was not an occupier of Wallerawang Power Station
- Eraring is a Category 1 and Category 2 Defendant
- Extensive background to the construction of Wallerawang Power Station is provided (in 29 separate paragraphs over 6 pages) that is intended to show the immense size and sophistication of Eraring
- It had completed construction of Wallerawang Power Station prior to commencement of the plaintiff's employment
- Eraring was intimately involved in the design of Wallerawang Power Station and ignored suggestions as to the use of non asbestos insulation

BAL

- Eraring should be a category 2 Defendant only

- The Standard Presumptions should be varied against BIL in the light of the findings in the matter of *Royal* that the liability to contribute of BIL should be five times that of BAL
- The Standard Presumptions should be varied against Amaca and WGL in favour of BAL

Alstom

- It does admit occupation of Munmorah Power Station
- Design of the turbines installed by it was performed by a third party, The English Electric Company Limited
- Eraring should be a category 2 Defendant only
- The Standard Presumptions should be varied against Eraring by 20%
- It believes it had completed its work at Munmorah Power Station by 1967
- It believes it had no involvement with construction of boilers

Power Tech

- It was not an occupier of any Power Station
- Admits involvement in construction of four boilers commissioned in 1967, 1968, 1969 and 1970 but says there is no evidence the plaintiff was exposed as a result
- Eraring is a Category 2 Defendant only
- The Standard Presumptions should be varied against Eraring by 20% given its position as employer of the plaintiff and its role as occupier of the premises and in the light of the state of its knowledge as set out in *Hay* and *Nichols*

BIL

- It is sued only for the Wangi Power Station period
- The plaintiff's employment card is the best measure of likely exposure
- *Royal* is distinct from this plaintiff's claim because it involves different employment duties and different periods of employment and therefore the BAL argument that BIL should be five times as liable as BAL is to be rejected (extensive arguments are set out as to the proper contribution between BIL and BAL.)
- BIL was not present at Wangi Power Station at the relevant times
- The plaintiff's exposure as indicated in his employment card is 212 months and should be divided into three periods being Wangi Power Station 24 months, Wallerawang Power Station 25 months and Munmorah Power Station, 163 months.
- Eraring is a Category 1 and Category 2 Defendant
- The Standard Presumptions should be varied against Eraring by 20% because of the state of its actual knowledge of the dangers of asbestos or in the alternative its wilful blindness to the dangers of asbestos (an extremely detailed analysis of decided authority, Section 25B general issues and primary documents is conducted) and its role as controller of the workplace
- The Standard Presumptions should be varied against Amaca, CSR and WGL due to their size and sophistication and role as leaders in the industry
- The Standard Presumptions should be varied against Power Tech because of the state of its actual knowledge of the dangers of asbestos
- The supplier defendants should be more liable than the other Category 1 Defendants
- BIL should not be found liable

CONTRIBUTION ASSESSMENT

It is apparent that each Reply has been prepared with great care and detail and they are each of great assistance.

It is necessary first to calculate the separate periods of exposure as a percentage of the total exposure.

The plaintiff worked at Wangi Power Station for a total of 2 years, 3 months and 2 weeks apart from a period of time when he trained at Wallerawang and Pymont. He does not say how long he was at each separately. I conclude that he worked for 2 months at Wallerawang while he was training and that therefore his employment at Wangi Power Station is approximately 25 months. He worked at Wallerawang Power Station from 1 November 1965 until 3 October 1967 which is 1 year and 11 months but taking into account the two months of training I conclude that his employment at Wallerawang Power Station was 25 months. He then worked at Munmorah Power Station from 3 October 1967 to 1 July 1981. He says that while exposure continued after August 1977 I interpret his particulars to mean that exposure after August 1977 was light. Therefore I conclude that exposure at Munmorah Power Station involved 130 months.

The plaintiff's total period of exposure was therefore 180 months

The percentage of the total for each period is:

- Wangi Power Station – 14% (rounded up)
- Wallerawang Power Station – 14% (rounded up)
- Munmorah Power Station – 72% (rounded down)

I consider it appropriate to depart from the Standard Presumptions as between Category 1 and Category 2 Defendants in relation to Eraring. In this respect I refer particularly to the very detailed analysis contained in the BIL Reply and the contentions in the Rolls Royce Reply and weigh these against the arguments in the Eraring Reply. I consider that contribution should be equal. As I observed in Monteath I can make no relevant distinction between Eraring on the one hand as a Category 2 Defendant given that it is effectively the State and the Category 1 Defendants. This variation does not ultimately produce a result that I consider just and equitable in the circumstances of this plaintiff's exposure and I will refer to this.

The 14% at Wangi Power Station is to be divided 50% (7%) between Eraring, Amaca/CSR, BIL, BAL, NSW and WGL, and then 7% to Eraring. This results in 1.16% each for the Category 1 Defendant contribution. I think it produces a just and equitable outcome if this figure is increased to 1.2% for Amaca/CSR, BIL, BAL, NSW and WGL and is reduced to 1% for Eraring

The 14% at Wallerawang Power Station is to be divided 50% (7%) between Eraring, Amaca/CSR, Rolls Royce, NSW, WGL, and then 7% to Eraring. This results in 1.4 % each for the Category 1 Defendant contribution. I think it produces a just and equitable outcome if this figure is increased to 1.5% for Amaca/CSR, NSW, Rolls Royce and WGL and reduced to 1% for Eraring.

The 72% at Munmorah Power Station is to be divided 50% (36%) to Eraring, Amaca/CSR, Power Tech, Alstom, BAE, and NSW and then 36% to Eraring. This results in 6 % each for the Category 1 Defendant contribution. I think it produces a just and equitable outcome if this figure is increased to 6.5% for Amaca/CSR, NSW, Alstom, Power Tech and BAE and reduced to 3.5% for Eraring

Amaca's contribution is to be shared equally with CSR.

Eraring's contribution on the above calculations is $1\% + 7\% + 1\% + 7\% + 3.5\% + 36\% = 55.5\%$.

I do not consider that this contribution reflects the overall culpability of Eraring as compared to all the other parties that contributed to exposure. Eraring had constructive knowledge of the dangers of exposure by the time the plaintiff was working at Munmorah Power Station and actual knowledge by the 1970s however it says it did take steps to address these dangers. I do consider that the "supplier" defendants are particularly culpable for exposure occurring for the majority of the plaintiff's time at Munmorah Power Station and in this regard I am persuaded by the arguments contained in Eraring's Reply. I consider that on balance a proper reflection of Eraring's culpability would be a 50% contribution. I consider it appropriate to apportion 5.5% of the Eraring contribution on the above calculations to Amaca/CSR as to 3.5%, NSW as to 1% and BAE as to 1%.

I determine contribution to be:

- Eraring – 50%
- Amaca – 6.35%
- CSR - 6.35%
- BIL – 1.2%
- BAL – 1.2%
- WGL – 2.7%
- BAE – 7.5%
- NSW – 10.2%
- Power Tech – 6.5%
- Alstom – 6.5%
- Rolls Royce – 1.5%

I appoint Eraring as Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred

Date: 18 August 2011