

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES
DDT No.273/09

WILLIAM ALFRED STUART
Plaintiff

ERARING ENERGY
Defendant/Cross-Claimant

BABCOCK INTERNATIONAL LTD
First Cross-Defendant

BABCOCK AUSTRALIA PTY LIMITED
Second Cross-Defendant

WALLABY GRIP LIMITED
Third Cross-Defendant

AMACA PTY LIMITED
Fourth Cross-Defendant

ROLLS ROYCE AUSTRALIA LIMITED
Fifth Cross-Defendant

CONTRIBUTION 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 Regulation 2007 ("the Regulations") for a determination of the apportionment as between the Defendant and the Cross-Defendants.
2. Under Regulation 49 of the Regulations regard can be had to the Statement of Particulars provided by the Plaintiff and the replies as filed by the Defendants and not to any other document including the Statement of Claim. However, given the fact that the Plaintiff has given evidence, I have taken the evidence into account as being part of his Statement of Particulars.
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. In the present proceedings, the Plaintiff issued a Statement of Claim on 17 September 2009 alleging that from about early 1956 to late 1957 or early 1958 [hereinafter referred to as "first period"] he was employed by Eraring Energy as a labourer at the Lithgow Power Station and that, during the course of his employment, he worked with and handled insulation materials containing asbestos, and further that, while he was so employed, he was required to work in the vicinity of other workers working with and handling asbestos insulation material. Additionally the Plaintiff alleges that from early 1958 to late 1960 [hereinafter referred to as "second period"] he was employed by Eraring Energy as a labourer at the Wallerawang and again during this period of employment he had exposure to asbestos in the same manner as he had while working at Lithgow Power Station.
5. The Statement of Claim alleges that the Plaintiff suffered injuries in the nature of a primary adenocarcinoma or a secondary carcinoma, together with pleural plaques.
6. Eraring has issued a cross-claim against Babcock International Limited [hereinafter referred to as "BIL"] and Babcock Australia Pty Limited [hereinafter referred to as "BIL"] and Wallaby Grip Ltd [hereinafter referred to as "WGL"] and Amaca Pty Limited [hereinafter referred to as "Amaca"] in respect of the exposure during the first period, and separately has brought cross-claims against WGL, Amaca and Rolls Royce Australia Limited [hereinafter referred to as "Rolls Royce"] in respect of the second period.
7. On 22 September 2009 the Plaintiff filed a Statement of Particulars in which he relevantly alleges the following:
 - (i) Employment with Eraring at Lithgow between 1 October 1956 to 7 April 1957.
 - (ii) Employment with Eraring at Wallerawang Power Station between 8 April 1957 and 21 April 1961.
 - (iii) When the Plaintiff arrived at Lithgow Power Station the boilers were then fully operational. The power station had a floor level and a mezzanine level containing 6 Babcock & Wilcox boilers, with the power station having been built in 1926. The mezzanine level housed 3 new Babcock & Wilcox boilers.
 - (iv) The pipes of the boilers were lagged with a mixture, which looked like plaster made from asbestos powder and water.

- (v) The asbestos powder and fibre was taken from huge bags and emptied into a large drum and mixed with water to form a slurry and the slurry was then applied to the pipes by hand or a trowel. The Plaintiff alleges that there was a lot of dust created when the asbestos was applied, and that there was a lot of dust generated when lagging operations took place and when repair work was undertaken on the steam pipes and boilers.
- (vi) On occasions the boilers were shut down for maintenance work and that Plaintiff performed work assisting which involved him getting into the firebox and pulling down the bricks and mortar, mix the asbestos mortar and re-apply it. The shut down necessitated the removal and re-application of asbestos lagging on the boilers and the Plaintiff worked near the ladders when the lagging was being mixed and applied.
- (vii) The Plaintiff alleges that his exposure to asbestos was daily and the Plaintiff alleges that his period of employment at Lithgow Power Station accounted for 100% [sic] of his exposure.
- (viii) In relation to Wallerawang Power Station, the Plaintiff was initially employed as a labourer and then promoted to trades assistant and the work performed at Wallerawang was similar to that performed at Lithgow.
- (ix) The Plaintiff's exposure at Wallerawang was daily and the intensity was described as being high and that it accounted for 100% [sic] of his exposure.

8. The Plaintiff gave evidence on 21 September 2009 in which he identified:

- (i) Half pipe sections from boxes of Hardies 85% magnesia.
- (ii) At Lithgow he was only concerned with the boilers in the boiler house and sometimes to help out riggers.
- (iii) He installed and removed asbestos on boilers twice while under the instruction and supervision of Eraring employees.
- (iv) That at Wallerawang the boilers were still being constructed and that when the Plaintiff first arrived the number 1 boiler was just about finished.
- (v) While working at Wallerawang there were large clouds of asbestos dust released into the atmosphere.

9. Eraring Energy filed a Reply on 22 September 2009 which alleges the following:

- (i) BIL and BAL were joined in relation to the Plaintiff's employment at the Lithgow Power Station from 1 October 1956 to 7 April 1957 in respect of their role in the design and construction of the boilers which were insulated, sealed and/or packed with products containing asbestos dust and fibre.
- (ii) Rolls Royce was joined in relation to the Plaintiff's employment at the Wallerawang Power Station from 8 April 1957 to 21 April 1961 in relation to its role in the design and construction of the boilers which were insulated, sealed and/or products containing asbestos dust and fibre. Rolls Royce was also joined as an occupier of the Wallerawang Power Station during the Plaintiff's employment.
- (iii) The industrial boilers, turbines, steam pipes and associated steam plant constructed by Eraring Energy's predecessor's contractors including BIL and BAL and Rolls Royce at both Lithgow and Wallerawang Power Stations where insulated, sealed and/or packed with asbestos products manufactured by Amaca and WGL. Eraring Energy refers to its submissions outlined in Part 8 of the Reply to its Cross-Claim.
- (iv) Eraring admits that the Plaintiff was employed from 1 October 1956 to 7 April 1957 at the Lithgow Power Station and from 8 April 1957 to 21 April 1961 at the Wallerawang Power Station.
- (v) During the various periods including the Plaintiff's employment periods the power stations were occupied and controlled by contractors and subcontractors.
- (vi) In relation to Wallerawang Power Station, Rolls Royce was then constructing the remaining boilers throughout the period of the Plaintiff's employment, and while the Plaintiff only worked in boiler 1 and was exposed to the asbestos being applied by these contractors in their sections.
- (vii) Eraring admits that its predecessor in title, the Electricity Commission of New South Wales, owned and occupied both the Lithgow Power Station and the Wallerawang Power Station during the respective periods as alleged, but that it was not the sole party in occupation. Eraring submits that its predecessor should be treated as a Category 2 Defendant.
- (viii) BIL, BAL, Amaca, WGL, Rolls Royce should be placed in Category 1.
- (ix) In addition, Rolls Royce should be placed in Category 2 because it was the occupier of premises which contained asbestos or products, plant and equipment
- (x) The standard presumption should be varied against the Category 1 parties having regard to the identity, capacity, size and state of sophistication of those parties, but the standard presumption should not be varied as against Eraring.

- (xi) That period 1 at Lithgow Power Station should equate to 6 months and period 2 at Wallerawang Power Station should be assessed at 4 years. In other words, Lithgow Power Station accounts for 11% of the Plaintiff's overall exposure and Wallerawang Power Station accounts for 89% of the Plaintiff's overall exposure.
 - (xii) That 75% of the first period should be borne by BAL, BIL, Amaca and WGL, each bearing 18.75% with Eraring Energy being a Category 2 being assessed at 25%.
 - (xiii) Eraring submits that there should be no variation in respect of the first period.
 - (xiv) In respect of the second period, only Period A should be applied, given that only 4 months extends into Period B.
 - (xv) That the division should be Rolls Royce 25%, Amaca 25%, WGL 25%, total 75%. Category 2 Eraring 12.5% and Rolls Royce 12.5%, total 25%. Thus the total is Rolls Royce 35.5%, Amaca 25%, WGL 25%, Eraring 12.5%, and making 100%. Applying the percentages to the 89% allocated to the second period, the final determination becomes Rolls Royce 33.75%, Amaca 22.25%, WGL 22.25%, Eraring 11.125%.
 - (xvi) When the two periods are brought together, the final result would be BIL 2.0625%, BAL 2.0625%, Amaca 24.3125%, WGL 24.3125%, Rolls Royce 33.375% and Eraring Energy 13.875%.
10. Eraring filed an Amended Reply on 23 September 2009, which did not alter the apportionment as set forth in the original reply and attached to it the transcript of the Plaintiff's evidence taken on 21 September 2009. It also introduced correspondence and Affidavits not previously referred to.
11. On 24 September 2009 BAL filed its reply which sets forth the following:
- (i) The Plaintiff does not allege that it was exposed to asbestos products manufactured and/or supplied by BAL.
 - (ii) That BAL disputes that it breached its duty of care to the Plaintiff during the entirety of his alleged asbestos exposure at Lithgow Power Station because neither the Plaintiff nor Eraring have identified whether the Plaintiff's asbestos exposure was due to BAL's activities as any activities at BAL occurred prior to the Plaintiff commencing his employment.
 - (iii) BAL should be placed in category 1.

- (iv) Eraring should be regarded as having actual knowledge of the dangers of asbestos – see *William Roy Nicolls v Pacific Power* (DDT104/97).
- (v) BIL should be placed in category 1.
- (vi) Because BAL had completed installation of the boilers at Lithgow Power Station prior to 1 October 1956 and was no longer present at Lithgow Power Station, BAL had no ability or capacity to prevent or minimise the Plaintiff's asbestos exposure.
- (vii) That in relation to Lithgow Power Station of the 11% of the Plaintiff's exposure attributed, it should be apportioned 65% to Category 1 defendants and 35% to Eraring as a Category 2 defendant and that as between BAL and BIL, the ratio should BIL 5 to BAL 1.

12. Amaca provided a Reply on 24 September 2009 which, so far as is relevant, submits as follows:

- (i) Category 1 defendants should be Amaca, WGL, Rolls Royce Australia Ltd, BAL, BIL. Category 2 defendants should be Rolls Royce Australia and Eraring.
- (ii) However, Amaca further asserts that Eraring Energy should be categorised as both a Category 1 and a Category 2 defendant.
- (iii) That as against Eraring, both as an employer and both as a category 1 defendant and category 2 defendant, there should be a variation of 20% in the presumption.
- (iv) That period 1 accounts for 11% and that the apportionment should be: BIL 0.6875%, BAL, 0.6875%, Amaca 0.6875%, WGL 0.6875%, Eraring Energy (category 1) 2.75%, Eraring Energy (category 2) 5.5%.
- (v) In relation to period 2, representing 89% of the Plaintiff's exposure while he was at Wallerawang Power Station, Amaca submits the apportionment should be that Rolls Royce (category 1) 7.42%, Amaca (category 1) 7.42%, WGL (category 1) 7.42%, Eraring Energy (category 1) 22.25%, Eraring Energy (category 2) 22.25% and Rolls Royce (category 2) 22.25%.
- (vi) Thus the total is: BIL 0.6875%, BAL 0.6875%, Amaca 8.1075%; WGL 8.1075%, Rolls Royce 29.67%; Eraring 52.74%.

13. BIL provided a Reply on 24 September 2009:

- (i) BIL denies that the Plaintiff was exposed to any asbestos products manufactured or supplied by BIL.
- (ii) BIL was not present at Lithgow at the time of the Plaintiff's exposure.
- (iii) That the periods of employment should be divided strictly according to the requirements of the legislation, which means double accounting for the period at the Wallerawang Power Station between 8 April 1957 and 1 January 1961, as the first period and 1 January 1961 to 21 April 1961 for the second period.
- (iv) Eraring should be placed in Category 1 and category 2 in relation to the Lithgow Power Station, particularly given the evidence that the Plaintiff provided that he installed and removed asbestos on boilers at Lithgow Power Station twice, with the work being undertaken under the supervision and instruction of Eraring employees. Additionally, Eraring should be placed in Category 2 in relation to the Wallerawang Power Station as an employer and occupier. BIL should be placed in category 1. BAL should be placed in Category 1. WGL should be placed in Category 1 and Amaca should be placed in Category 1. Rolls Royce should be placed in Category 1 and Category 2. There should be an adjustment of the standard presumption.
- (v) The apportionment should be: Eraring 30%, BIL 1%, BAL 1%, WGL 19%, Amaca 19%, Rolls Royce 30%.

14. Rolls Royce Australia provided a Reply on 24 September 2009 which asserted that:

- (i) Eraring should be in categories 1 and 2 and that accordingly the apportionment should be Eraring 43.33%, BIL 1.65%, BAL 1.65%, Wallaby Grip 18.33% Amaca 18.33% Rolls Royce 16.68%; or alternatively,
- (ii) If Eraring was simply a category 2 employer then Eraring 25% BIL 2.06%, BAL 2.06%, Wallaby Grip 24.31%, Amaca 24.31%, Rolls Royce 22.25%.
- (iii) On the assumption that Eraring's position is greater, then it is submitted the break-up should be: Eraring 43.33%, BIL 1.65%, BAL 1.65%, Wallaby Grip 18.33%, Amaca 25%, Rolls Royce 10.01%.

15. WGL provided a Reply on 24 September 2009 and relevantly provided as follows:

- (i) During the first period (11% of the exposure) the apportionment should be: Eraring (category 2) 6%, Amaca (category 1) 1%, WGL (category 1) 1%, Eraring (category 1) 1%, BIL 1% BAL 1%.
- (ii) In respect of the second period of apportionment, representing 89% of the Plaintiff's exposure, the break-up should be: Eraring as employer 49%, Amaca as installer 10.2%, WGL 10.2%, Eraring (installer) 10.2%, Rolls Royce 10.2% - total 89%.
- (iii) Thus the total provision becomes: Eraring 55%, Amaca 18.75% WGL 2.5%, BIL 2.5% BAL 2.5%, rolls Royce 18.75%

16. On the basis of the material that has been placed before me, the following factual considerations are to be noted:

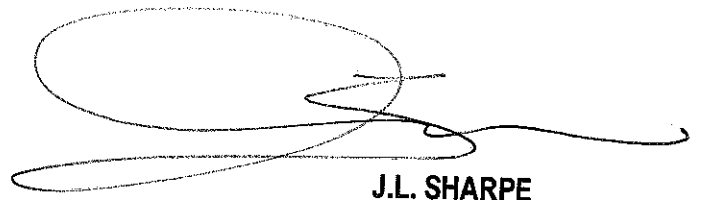
- (a) The Plaintiff suffers from an adenocarcinoma, which, for the purposes of this assessment is considered to be indivisible.
- (b) The total length of exposure to asbestos can be broken up as to 11% of the total exposure occurring in period A and 89% of exposure in period B. While it is true that some of the employment extends beyond 1 January 1961, for the purposes of the present assessment, such extension is to be regarded as being part of period A and thus all of the assessment has been based upon the requirement of the standard presumptions, namely that category 1 defendants are to bear 75% and category 2 defendants 25%.
- (c) The Plaintiff was an employee of Eraring.
- (d) Neither the defendant nor the cross-defendant took any steps to minimise the risk of being exposed to asbestos.
- (e) The defendant and the cross-defendant were each well versed in the use of asbestos and given the legislative approach to apportionment, the standard presumptions should not be varied.

17. I have determined the liability to contribute having regard to the relative culpability of the Defendant the Cross-defendants, and the causal potency of the contribution. In relation to period 1, I have determined that BIL, BAL, Amaca, WGL and Eraring should be placed in Category 1 but that in addition Eraring should be placed in category 2. In particular, I note the Plaintiff's evidence as to the work performed by him while employed by Eraring at Lithgow.

18. Thus, in the **first period** [i.e. 11% of the total exposure] the Category 1 Defendants are responsible for 75% and the Category 2 Defendant is liable for 25%. Thus of the total [i.e. 100%] exposure BIL, BAL Amaca and WGL each are liable for 1.65% and Eraring 4.4%.
19. In relation to period 2, [i.e. 89% of the total exposure, I determine that Rolls Royce, Amaca, WGL be placed in Category 1 and that Eraring and Rolls Royce be placed in category 2.
20. The Category 1 Defendants bear 75% of the liability and the Category 2 Defendants 25% of the liability. Thus of the total exposure [i.e. 100%] Amaca, WGL are each liable for 22.25%, Rolls Royce for 33.375% and Eraring 11.125%
21. Accordingly, the Defendants are to contribute in the following proportions:

Eraring	15.525
BIL	1.65
BAL	1.65
Amaca	23.9
WGL	23.9
Rolls Royce	33.375

22. I appoint Rolls Royce as the SCM (see clause 61(3)(b)) of the *Dust Diseases Tribunal Regulations 2007*.
23. I have made the above determination having regard to Regulation 49 of the Regulations, which requires that I am to assume that the Defendant and the Cross-defendants are liable.



J.L. SHARPE

25 September 2009