

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 5087 of 2005/1

BETWEEN:

SYDNEY OLYMPIC PARK AUTHORITY
Cross Claimant

AND

AMACA PTY LTD
Cross Defendant

WALLABY GRIP LTD
Second Cross Defendant

WALLABY GRIP (BAE) PTY LTD (IN LIQ)
Third Cross Defendant

WALLABY GRIP (NSW) PTY LTD (IN LIQ)
Fourth Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 5 March 2009 pursuant to Clauses 49(1) and 55(1)(b) of the *Dust Diseases Tribunal Regulation 2007 (NSW) (the Regulations)* for a determination of apportionment as between the plaintiff and defendant.
2. The determination is to be made by me on the papers, on the assumption that the Cross Defendant is liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007 (Standard Presumptions)*.

3. The principal proceedings commenced in 2005 and were between Thomas Patrick McGrath and the State of New South Wales. The Sydney Olympic Park Authority (**SOPA**) was substituted for the State of New South Wales as the defendant in 2006. Judgment was entered in Mr McGrath's favour against SOPA in March 2006 in the sum of \$230,000.
4. SOPA filed a cross claim joining Amaca Pty Ltd (**Amaca**), Wallaby Grip Ltd (**WGL**), Wallaby Grip (BAE) Pty Ltd (in liq) (**BAE**) and Wallaby Grip (NSW) Pty Ltd (in liq) (**WGNSW**). On 1 September 2008 consent orders were made by O'Meally P giving verdict and judgment for SOPA against WGL, BAE and WGNSW in the sum of \$96,000 inclusive of costs. Accordingly the only remaining cross defendant to the cross claim is Amaca.
5. SOPA filed a document entitled "Defendant's Revised Reply" on 3 October 2008. Amaca has not filed a response to that document.

The Principal Proceedings

6. In order to understand SOPA's claim against Amaca it is necessary to recapitulate some of the contentions made by Mr McGrath in his Statement of Particulars as to his exposure to asbestos.
7. Mr McGrath's entire history of employment was at the state abattoir at Homebush, New South Wales. He commenced worked in 1935 and retired in 1985. He started work as a cleaner and worked his way up through the ranks of trainee to qualified butcher and slaughterman. He worked fulltime at the abattoir from 1943 – 1985.
8. He had no exposure to asbestos outside of work: Statement of Particulars ¶ 3.2.

9. Mr McGrath recollected that hot water was used extensively in the abattoir to clean the carcasses and the floor. Pipes carried steam from a boiler room to the abattoir floor. Steel buckets were filled with water and steam percolated through the water to heat it up. Mr McGrath was responsible for filling and heating the water, and he did so on a daily basis.
10. The steam pipes were wrapped in asbestos insulation. He recalls handling and disturbing the insulation when he filled the buckets of water: SOP ¶ 10.
11. The lagging that wrapped the steam pipes deteriorated over time and developed frays and was in need of repair. Dust came off the frayed lagging. He recalled that when the steam pipes were turned on the pipes vibrated and so asbestos was released into the air. He recalls breathing in that asbestos.
12. Mr McGrath also recalls being in the vicinity when plumbers were employed to maintain the pipework. He said in his Statement of Particulars "*Visible dust from the lagging was given off into my work area when this maintenance work was done*" (SOP ¶ 4.2). He was also present when insulation was stripped from the pipes and replaced.
13. Mr McGrath also recalls that the roof of the abattoir was clad with corrugated asbestos cement fibre. He recalls that asbestos dust and fragments fell from the ceiling into his work area. Vibrations in the building were a common cause of the dust falling.
14. Mr McGrath was not given any protective clothing or breathing equipment during his employment.
15. He recalls that his exposure to asbestos was "*medium intensity until about the late 1970s or early 1980s*". With only one location for his exposure the description of the intensity of his exposure is highly subjective. However, the

important issue in this case is that it was his only known source of asbestos exposure.

16. Mr McGrath did not distinguish between the intensity of his exposure from lagging as compared to AC sheeting fixed to the abattoir roof.

17. Many years after his initial exposure Mr McGrath developed mesothelioma.

SOPA's cross claim

18. As I noted above SOPA filed a cross claim against the manufacturers who supplied asbestos for use in the abattoir. The claims against WGL, BAE and WGNSW have resolved.

19. SOPA filed a Revised Reply on 3 October 2008. A review of the file indicates that the only step taken by Amaca to date in the proceedings has been to file a Notice of Appearance. It has not filed a Reply to SOPA's claim. Accordingly the only submissions before me in respect of the liability of SOPA and Amaca are made by SOPA's solicitors.

20. Attached to SOPA's Revised Reply were five documents comprising two pages from James Hardie brochures noting AC sheeting installed at the abattoir (annexures A and B), Hardie BI invoices for October and November 1967 for the supply of 85% Magnesia in the sum of \$61.88 (annexure C) and \$66.44 (annexure D) and which is described as a "*handwritten witness statement of Hugh Harvie dated 2 March 2000*".

21. Mr Harvie was employed at the Homebush abattoir from 1937 to 1982 and was purchasing officer for 15 years to 1978. His responsibilities included purchasing supplies for the abattoir. He recalls asbestos was purchased for

use as lagging on the site. He believes that the asbestos suppliers were approved suppliers from the Contracts Control Board.

22. He placed orders with James Hardie & Co at Camellia and with Bells Asbestos. He recollects that some of the product supplied was rope used for lagging.

Categorising the Parties

23. SOPA submits that it should be placed in category 2 and Amaca in category 1. I agree with that submission.

Summary

24. Mesothelioma is an indivisible disease.

25. There is a difficulty in assessing the apportionment in this case. As I have noted above Amaca has not filed a Reply and there were originally 4 cross defendants to the cross claim although the proceedings have resolved as against the other three. There is scant evidence of what products were supplied by the cross-defendants, the proportions that were supplied and when they were supplied. There is also very scant evidence as to which of the cross defendants' products were used in lagging the steam pipes, although there is better evidence that Amaca was responsible for installing AC sheets on the abattoir roof (see further below).

26. The Standard Presumptions are silent as to how to apportion loss when some defendants have resolved their claim with the plaintiff or cross claimant. The parties did not make submissions on the approach I should take.

27. I am obliged to find that Amaca is liable.

28. In its submissions SOPA makes no submission as to the percentage apportionment between as between it and Amaca.

29. There are real issues about the extent of knowledge of SOPA as to the danger of exposure to asbestos at any given time of Mr McGrath's exposure and whether the standard presumptions should be varied accordingly. In published decisions of the DDT knowledge of the State of New South Wales has been imputed to various statutory entities it controlled. In this case, I have no submissions on that topic.

30. I consider the best approach is to assume that each of the cross defendants supplied products for the entire period that Mr McGrath was exposed to asbestos at the abattoir ie 1935 to about 1985. I find that Amaca supplied AC sheeting from 1935 and that the exposure to asbestos from AC sheeting continued until 1985. I make that finding based on the contents of the James Hardie brochure that is annexure B which states: "*Approximately 89,500 square feet of FIBROLITE Corrugated Sheets have been used since 1924 for roofing various buildings at the NSW State Abattoir and Meat Works, Homebush*" (my emphasis as to the date).

31. I further find that I should apply the apportionments prescribed in the Table in Clause 5 of the Standard Presumptions without variation.

32. I propose to assume that each of the cross defendants was equally liable for the plaintiff's loss and that each was a Category 1 cross defendant. That the proceedings with WGL, BAE and WG(NSW) have resolved does not mean that the apportionment of Amaca should be adjusted so that it is solely responsible for the remainder of the claim.

33. Mr McGrath was exposed to asbestos for 50 years being:

Period A (1935 – 31 Dec 1960) – 26 years

Period B (1 Jan 1961 – 31 Dec 1978) – 18 years

Period C – (1 Jan 1979 – 31 Dec 1985) – 6 years

34. Doing the best I can, and in the absence of submissions from either party, I make the following assessment:

Period A (26 of 50 years = 52%)

Amaca	$25\% \times 75\% \times 52\% = 9.75\%$
Other cat 1	$75\% \times 75\% \times 52\% = 29.25\%$
NSW	$25\% \times 52\% = 13\%$

Period B (18 of 50 years = 36%)

Amaca	$25\% \times 65\% \times 36\% = 5.8\%$
Other cat 1	$75\% \times 65\% \times 36\% = 17.6\%$
NSW	$35\% \times 36\% = 12.6\%$

Period C (6 of 50 years = 12%)

Amaca	$25\% \times 60\% \times 12\% = 1.8\%$
Other cat 1	$75\% \times 60\% \times 12\% = 5.4\%$
NSW	$40\% \times 12\% = 4.8\%$

35. SOPA has reached an agreement with the other category 1 defendants. Therefore, the only relevant matter is the apportionment attributable to Amaca. I find that that amount is 17.35% of the total.

36. I have not been asked to appoint a Single Claims Manager.

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David Jay

22 April 2009