

**Stanley John Vidler –v- Boral Limited & Delta Electricity**

**DDT No 8224/08**

**Determination of Apportionment**

1. The Registrar of the Dust Diseases Tribunal referred this matter to me to determine the contribution that each Defendant is liable to make pursuant to clause 49 of the Dust Diseases Tribunal Regulation 2007 (hereinafter referred to as “the Regulations”).
2. By reason of clause 49 of the Regulations, I am bound to assume that
  - a. Each Defendant is liable.
  - b. The circumstances of the Plaintiff’s exposure to asbestos are as set forth in his Statement of Particulars (Form 2). (Additionally in this matter, I am to have regard to the Transcript of the evidence of the Plaintiff taken on 19<sup>th</sup> August 2008).
3. Having made the assumptions above, my determination be made solely on the basis of:
  - a. The Plaintiff’s Statement of Particulars,
  - b. The Plaintiff’s evidence
  - c. The Defendants’ Replies
  - d. The Standard Presumptions, which are incorporated in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.
4. The Standard Presumptions in the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 requires that liability be apportioned upon basis that the standard presumptions apply with such variations as are appropriate to the case, but within a permitted range.

**The Plaintiff’s Particulars**

5. Stanley John Vidler (hereinafter referred to as “The Plaintiff”) has brought proceedings in the Dust Diseases Tribunal against the Defendants.
6. The Plaintiff’s particulars are contained in a Statement of Particulars, an Affidavit dated 5<sup>th</sup> August 2008, and his evidence given on 19<sup>th</sup> August 2001.

7. The Plaintiff alleges that: -
- a. He was employed by the **First Defendant** as a kiln burner and other positions between 9.5.68 and 3.9.76 (i.e. 9 years).
  - b. In the course of his employment with the **First Defendant** he was exposed to asbestos dust and fibre.
  - c. He describes his exposure to asbestos while working for the **First Defendant** as being "significant", including working around the kilns which were lagged with asbestos, being present while fellow workers mixed up the asbestos for lagging, the installation and removal of fire bricks, which included mixing asbestos for the re-bedding of the firebricks, and the use of asbestos gloves
  - d. His exposure to asbestos while employed by the **First Defendant** was "medium to high exposure" on a "daily" basis. The Plaintiff made some concessions as to the extent of his exposure in giving his evidence.
  - e. He assesses that 60% of his exposure occurred while working for the **First Defendant**.
  - f. He was employed by the **Second Defendant** as a cleaner labourer between 6.9.76 and 25.8.2001 (i.e. 26 years).
  - g. In the course of his employment with the **Second Defendant** he was exposed to asbestos dust and fibre.
  - h. His exposure to asbestos while employed by the **Second Defendant** for the first 3-4 years involved cleaning off asbestos that had fallen off steam pipes, above each boiler and on the floor, and using air hoses to blow asbestos particles from the motors. Thereafter while working on the conveyor belt line, exposed to asbestos around the various parts of the Power Plant.
  - i. He asserts that there was always asbestos dust on the ground (Transcript 3.50).
  - j. His exposure to asbestos while employed by the **Second Defendant** was "medium to high exposure" on a "daily" basis.
  - k. He alleges that in "recent" times was provided with a mask.
  - l. He assesses that 40% of his exposure occurred while working for the **Second Defendant**.
  - m. He has contracted a Pleural Mesothelioma
8. In his evidence, the Plaintiff essentially confirmed his exposure, while making some concessions as to the quantity of his exposure.

### The First Defendant's Reply

9. The **First Defendant** by its Reply alleges that: -
- a. Each Defendant should be Category 2.
  - b. The Plaintiff's exposure with the **First Defendant** was not daily, and was limited.
  - c. The periods of exposure are as alleged by the Plaintiff.
  - d. Each Defendant should be liable for 50% of the Plaintiff's claim.

### The Second Defendant's Reply

10. The **Second Defendant** by its Reply alleges that: -
- a. The Plaintiff alleged to the Dust Diseases Board that he had only been exposed to asbestos with the **Second Defendant** until 1983 (i.e. 7 years).
  - b. The Plaintiff was employed as a cleaner/labourer at Wallerawang Power Station between 6.9.76 and 4.10.79,
    - i. that his exposure would have been minimal, and
    - ii. that he would have cleaned dust other than asbestos, and
    - iii. that his exposure was as a "bystander", and
    - iv. that between 1976 and 1979 would have been minimal for reasons associated with Standing Instructions that were issued.
  - c. The Plaintiff began work on 4.10.79 as a Coal Conveyor Operator, when he worked outside the boiler and turbine halls in a separate building, and that any exposure to asbestos could only have occurred when he walked through the plant to get to or from his place of work, and thus the exposure was "irrelevant" to the Plaintiff's total exposure.
  - d. On a real time of exposure basis the Plaintiff had 73% of his exposure with the **First Defendant** and 27% of his exposure with the **Second Defendant**.
  - e. Each Defendant should be Category 2.
  - f. The Defendants' liability should be equal.
  - g. The Defendants' level of knowledge should be treated as the same
  - h. The Standard presumptions should not be varied.

11. Having regard to Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 – the following factual considerations are to be noted:
  - a. The Plaintiff suffers from malignant mesothelioma.
  - b. The condition from which the Plaintiff suffers is indivisible.
  - c. The total length of exposure to asbestos was alleged to be 35 years.
  - d. The type of asbestos to which the Plaintiff was exposed is unknown.
  - e. The lag time between exposure and diagnosis is sufficient as against both Defendants.
  - f. The Exposure occurred between 9.5.68 and 25.8.2001.
  - g. The Plaintiff was in each case an employee of the Defendants.
  - h. There were only 2 Defendants who exposed the Plaintiff to asbestos.
  - i. Neither Defendant took any steps to minimise the risks of being exposed to asbestos, except that the **Second Defendant** caused masks to be worn at the latter part of employment.

### **Application of the Standard Presumptions**

12. Both Defendants are in Category 2.
13. In each period the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 permits me to increase or decrease the percentage attribution by no more than 20 percentage points.
14. I have determined the liability to contribute having regard to the relative culpability of the Defendants and the causal potency of their contribution.
15. In the present case the standard presumptions should not be varied.

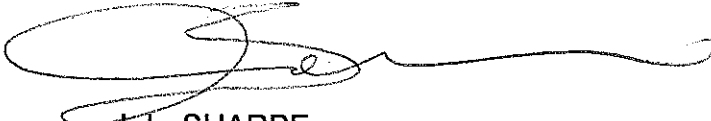
### **Determinations**

16. I make the following Determinations:
  - a. The Plaintiff's condition is mesothelioma.
  - b. Each Defendant falls into Category 2.
  - c. The Duration, and Intensity of the exposure to asbestos during each period of employment was not similar, and was

substantially less with the **Second Defendant**, but occurred over the whole period of employment. The exposure with the **First Defendant** was more intense and more constant than with the **Second Defendant**.

- d. The Defendants are to contribute in the following proportions:
- i. **First Defendant** = 60%
  - ii. **Second Defendant** = 40%

Dated August 20, 2008



J. L. SHARPE