

**CONTRIBUTIONS ASSESSMENT**

**DUST DISEASES TRIBUNAL**

**MATTER NO: 8216/2008 & 8216/2008CC1**

**Drago Zanki**

**Plaintiff**

**Fire Control Pty Limited**

**First Defendant**

**Macquarie Generation**

**Second Defendant/Cross Claimant**

**Alstom Australia Pty Limited**

**First Cross Defendant**

**Amaca Pty Limited**

**Second Cross Defendant**

**Wallaby Grip (BAE) Pty Limited**

**Third Cross Defendant**

**Wallaby Grip (NSW) Pty Limited**

**Fourth Cross Defendant**

## **DETERMINATION**

### **INTRODUCTION**

By letter dated 17 November 2008 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. Reply filed for First Defendant
2. Reply filed for Second Defendant
3. Reply filed for First Cross Defendant
4. Reply filed for Second Cross Defendant
5. Reply filed for Third Cross Defendant
6. Reply filed for Fourth Cross Defendant

In addition to the material described at 1-6 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

I record that the file of the Dust Diseases Tribunal does not contain a Statement of Particulars filed by the Plaintiff. I have been able to ascertain from the Replies filed by the Defendants and Cross Defendants that the plaintiff was exposed to asbestos

while working at Liddell Power Station (“Liddell”) under the employ of Fire Control from 1968 to 1974.

I assume that each defendant sued by the Plaintiff and each Cross Defendant is liable to the Plaintiff.

I will refer to the Defendants as:

First Defendant – Fire Control

Second Defendant – Macquarie

First Cross Defendant – Alstom

Second Cross Defendant – Amaca

Third Cross Defendant – BAE

Fourth Cross Defendant- NSW

### **CATEGORY OF DEFENDANT**

Amaca, BAE and NSW are all Category 1 Defendants.

Fire Control is a Category 2 Defendant.

Alstom concedes it is a Category 1 Defendant. It rejects the argument advanced by Macquarie that is supported by BAE/NSW that Alstom should also be a Category 2 Defendant. It is argued that Alstom was an occupier of Liddell. In the absence of any evidence beyond assertion I cannot accept that Alstom was an occupier of Liddell and therefore I find it is a Category 1 Defendant only.

## **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

Due to the absence of a Statement of Particulars the detail of the Plaintiff’s exposure is limited to that contained in the Replies. The Plaintiff was employed by Fire Control at Liddell from 1968 to 1974 and allegedly exposed to asbestos.

## **CONTRIBUTION ASSESSMENT**

The Plaintiff’s exposure occurred during Period B in the table at Clause 5 of the Standard Presumptions. Liability is therefore to be apportioned between the Category 1 and Category 2 Defendants 65%-35% unless I am satisfied a variable contribution should be applied.

Unless I am satisfied that a variable contribution should be applied I am to apportion liability equally between the defendants in each category. This results in the following contribution:

- Amaca - 16.25%
- NSW – 16.25%
- BAE – 16.25%
- Alstom – 16.25%

- Macquarie – 17.25%
- Fire Control – 17.25%

It is appropriate to record the main arguments that emerge from the Replies made by the Defendants.

Macquarie

- Liddell was occupied and controlled by contractors including Alstom that had its own site officers, resident engineers and supervisors.
- Alstom controlled its contractor's work practices at Liddell
- Any exposure that occurred during the construction of Liddell was caused by Alstom and NSW
- After construction of Liddell was complete exposure would have been minimal
- Alstom is properly regarded as both a Category 1 and Category 2 Defendant because it engaged in a business as installer of asbestos products and was also an occupier of premises
- The Standard Presumptions should be varied against the Category 1 Defendants because of their sophistication
- Amaca should be more liable than any other Defendant for a series of reasons demonstrating its increased culpability
- Fire Control as employer should be more liable than the other Category 2 Defendants
- Part of Alstom's liability should be attributed to Amaca

Alstom

- Alstom contracted to Macquarie to construct turbines at Liddell but did not design or supply the turbines
- Alstom did not occupy Liddell – I infer that this is a denial of occupation in the legal sense of controller and custodian
- Alstom should be a Category 1 Defendant only.
- The Standard Presumptions should be varied against Macquarie to increase its liability to 20% because it had actual knowledge of the dangers of asbestos.

The argument related to Macquarie's actual knowledge fails because it is against the overwhelming weight of decided judicial authority, as set out in Macquarie's Reply.

Additionally the evidence that Alstom seeks to rely on are two 1958 Memoranda however as I read these documents they do not provide evidence of actual knowledge.

NSW/BAE

BAE and NSW have filed a joint Reply.

- Neither manufactured pipe sections and blocks containing asbestos
- In the "mid 1970s" they possessed actual knowledge of the dangers of asbestos
- In the "mid 1970s" they began to place very specific warnings on its products
- Alstom should be both a Category 1 and Category 2 Defendant

- “For the period the plaintiff alleges he was employed by Fire Protection (sic) at Liddell Power Station between 1968 and 1974, BAE and NSW should be treated as one entity as the companies were operating consecutively”
- Macquarie possessed actual knowledge of the dangers of asbestos in 1964.

This argument does appear to be based on sound evidence, i.e Memoranda dated 1964 referring to “injurious dust” headed “Safety – Handling of Asbestos”. The argument is however against the weight of the decided judicial authority referred to in Macquarie’s Reply and of course I am bound to follow this authority.

- The “claimant’s particulars” refer to Macquarie staff and managers directing and controlling work at Liddell.

I do not know to what “particulars” reference is made because the Plaintiff has not filed a Statement of Particulars.

- The Standard Presumptions should be varied against Macquarie because it was “one of the largest employers in NSW at the time”.

Although it might well be the case that Macquarie was a large employer no evidence is provided in support of this assertion and I cannot make any finding in this regard.

- The Standard Presumptions should be varied against Amaca for the reasons set out in the Reply filed by Macquarie
- BAE/NSW was a minor supplier of asbestos products to Liddell.

This argument is based on an extract of Macquarie's List of Documents attached to the Reply filed by BAE/NSW. The extract provided has only three references to "Bells Asbestos" products. Therefore it is said that BAE/NSW was a minor supplier only. The extract provided makes no reference to supply of Amaca products to Liddell. I doubt if it is intended that the extracts serve to exculpate Amaca however this would be the logical extension of the argument posed by BAE/NSW. I cannot really consider the argument in the absence of provision of the entire List of Documents.

- The contribution of BAE/NSW should be reduced to 5%.

#### Amaca

The Reply filed by Amaca submits that the Standard Presumptions should not be varied.

#### Fire Control

The Reply filed by Fire Control submits that the Standard Presumptions should not be varied.

Alstom, BAE/NSW and Macquarie have each filed a Reply that makes a cogent and compelling argument as to why their respective contributions should be less than what would be the result if the Standard Presumptions were applied. Viewed in isolation each argument would be accepted. When however all the arguments are viewed

together it is clear to me that there is no good reason to depart from an application of the Standard Presumptions, the position submitted by Amaca and Fire Control. It seems to me that the approach to contribution adopted by Amaca and Fire Control is entirely consistent with the legislative intent of the Standard Presumptions.

I determine contribution to be:

- Amaca – 16.25%
- BAE – 16.25%
- NSW- 16.25%
- Alstom – 16.25%
- Macquarie – 17.5%
- Fire Control – 17.5%

I select Amaca to be Single Claims Manager at random.

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

Toby Tancred

Date : 24 November 2008