



Dust Diseases Tribunal of New South Wales

Year in Review: 2022

Prepared by:

Sandy Metcalf - Judicial Support Research Officer, Dust Diseases Tribunal

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Civil Procedure

Sliwinski v W Tolson & Company Pty Limited and Ors [2022] NSWDDT 7 (Judge Strathdee)

Decision date:

7 December 2022

Background:

- Following completion of the Claims Resolution Process, the plaintiff filed a Notice of Motion seeking leave to file a Further Amended Statement of Claim.
- The proposed Further Amended Statement of Claim added an additional defendant and additional allegations of exposure.
- The second defendant opposed the Motion.

Key Issues:

- Whether leave should be granted to the plaintiff to amend the Amended Statement of Claim, in circumstances where the Claims Resolution Process had concluded.
- Whether the proposed amendment would cause irreparable prejudice to the second defendant.
- Which party should bear costs associated with the Motion.

Decision:

- (1) I make an order in accordance with prayer 1 of the Notice of Motion filed 5 October 2022.
- (2) Costs of the Motion are reserved.
- (3) Listed for further directions before me on 30 January 2023.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/184e9dfc882e168265891ad9>

Costs

Marsh v Visy Recycling Australia Pty Ltd [2022] NSWDDT 2 (Judge Russell SC)

Decision date:

13 April 2022

Key Issue:

- Costs
 - Costs of Notice of Motion and Amended Notice of Motion to amend pleading in relation to identity of employer and period of employment, where:
 - costs thrown away as a result of the amendment.
 - costs incurred voluntarily by a party not yet joined to the proceedings.

Decision:

- (1) Decline to make the costs orders sought in par 12 of MFI 2.
- (2) Order that each party pay her or its own costs of the Notice of Motion filed on 19 June 2020 and the Amended Notice of Motion filed on 22 June 2020.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/18020978e634149d47d8181e>

Wilson v F.T. Eastment & Sons Pty Ltd (in liquidation) and Ors [2022] NSWDDT 4 (Judge Strathdee)

Decision date:

17 August 2022

Background:

- The plaintiff brought a claim against the defendant, a deregistered company, in the Dust Diseases Tribunal (“the DDT proceedings”);
- On the application of the plaintiff, the defendant was restored to the Company Register in Supreme Court proceedings (“the restoration proceedings”);
- The Supreme Court ordered that the costs of the application be costs in the DDT proceedings;
- The defendant subsequently issued cross-claims in the DDT proceedings;
- The plaintiff’s claim and the cross-claims settled prior to hearing. The only outstanding issue was costs of the restoration proceedings.

Key Issue:

- Costs
 - Whether costs of the restoration proceedings should be paid by all defendants and cross-defendants in the DDT proceedings.

Decision:

- (1) The restoration costs occasioned by the plaintiff in the Supreme Court proceedings are to be paid by Eastment, with no contribution from Amaca or Seltsam to those costs.
- (2) Eastment is to pay the costs of Amaca and Seltsam on this application in the Dust Diseases Tribunal.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/182a995ee121c65ddcb94e97>

Damages

Headon v Amaca Pty Ltd [2022] NSWDDT 5 (Judge Strathdee)

Decision date:

19 September 2022

Key Issues:

- Assessment of damages for asbestosis claim.
 - Relevance of principles of proportionality in award for general damages.
 - Whether there ought to be a deduction to damages awarded for future care, due to pre-existing condition.

Decision:

- (1) Judgment for the plaintiff in the sum of \$1,100,159.38.
- (2) Defendant to pay plaintiff's costs as agreed or assessed.
- (3) Pursuant to s 11A of the Dust Diseases Tribunal Act 1989 (NSW) as amended, the plaintiff may claim further damages should the plaintiff develop an asbestos related induced carcinoma, lung cancer and mesothelioma.
- (4) If any alternate order is sought, the parties to notify my associate within 7 days.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/183542b6580dfabfadca3d2a>

Hudson v Amaca Pty Ltd [2022] NSWDDT 6 (Judge Russell SC)

Decision date:

21 November 2022

Background:

- The plaintiff developed mesothelioma following exposure to asbestos in both NSW and ACT and commenced proceedings against the defendant.
- It was admitted by the defendant that the plaintiff had sufficient exposure in each jurisdiction to cause his mesothelioma.
- Following the plaintiff's death, the plaintiff's wife was substituted as the plaintiff.
- Claims were brought on behalf of the deceased's estate (under the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) and s 16 of the *Civil Law (Wrongs) Act 2002* (ACT) ("the *Wrong's Act*")) and for the benefit of the deceased's son (under the *Compensation to*

Relatives Act 1897 (NSW) and ss 24 and 25 of the *Wrongs Act*).

- Liability was not in issue. The only issue was the quantum of damages.

Key Issues:

- Choice of Law:
 - Assessment of damages where torts committed in both NSW and ACT and exposure in each jurisdiction sufficient to have caused deceased's mesothelioma (*lex loci delicti*).
- Assessment of damages for mesothelioma claim:
 - Whether plaintiff entitled to award of general damages and damages for loss of expectation of life under ACT law, where failure to give notice of claim under s 51(1) of the *Wrongs Act*.
 - Whether the second element of s 16(4) of the *Wrongs Act*, requiring the plaintiff to give notice of claim before the person's death, is substantive or procedural.
- Assessment of damages for Lord Campbell's Act claim:
 - Quantum of damages.

Decision:

- (1) The damages in the claim brought by the plaintiff for the benefit of the estate of the late Keith Hudson are assessed at \$475,840.38.
- (2) The damages in the claim brought by the plaintiff under Lord Campbell's Act for the benefit of Joseph Hudson are assessed at \$2,678,892 plus the costs of funds management.
- (3) Defer entry of final judgment pending ascertainment of the costs of funds management, by agreement or further hearing.
- (4) Order the defendant to pay the amount of \$475,840.38 to the plaintiff.
- (5) Order the defendant to pay the plaintiff's costs of the proceedings to date.
- (6) Stand the proceedings between the plaintiff and the defendant over generally with liberty to restore on 7 days notice.
- (7) Stand the cross claim over generally with liberty to restore on 7 days notice.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/18488b2d35d547931b619b8e>

Hudson v Amaca Pty Ltd (No 2) [2022] NSWDDT 9 (Judge Russell SC)

Decision date:

21 December 2022

Key Issue:

- Recalculation of damages assessed under Lord Campbell's Act claim.

Decision:

- (1) Vacate Order (2) made on 21 November 2022 and in lieu thereof the damages in the claim brought by the plaintiff under Lord Campbell's Act for the benefit of Joseph Hudson are assessed at \$2,362,334 plus the costs of funds management.
- (2) Order the defendant to pay the amount of \$2,362,334 into an interest-bearing trust account, to be opened jointly by the solicitor for the plaintiff and the solicitor for the defendant, pending the appointment of a trustee.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/18532569c0ca5f10ea3f32d0>

Discovery

Weber v Wollongong Coal & Ors [2022] NSWDDT 3 (Judge Strathdee)

Decision date:

17 August 2022

Key Issues:

- Whether the classes of documents in the proposed order for discovery are relevant to a fact or facts in issue in the proceedings, in circumstances where the defendants have placed every issue other than diagnosis of mixed dust pneumoconiosis in dispute.
- Whether an order for discovery is necessary.
- Whether the documents should be obtained by subpoena.
- Whether the proposed order for discovery would be oppressive.

Decision:

- (1) Pursuant to Part 21 of the Uniform Civil Procedure Rules 2005 and Rule 4 of the Dust Diseases Tribunal Rules 2019, the first defendant to provide verified discovery of the classes of documents as set out in Annexure A to the Notice of Motion filed 6 July 2022, but limited to the period 28 February 1996 and 28 February 2019, within 28 days of this date.
- (2) Pursuant to Part 21 of the Uniform Civil Procedure Rules 2005 and Rule 4 of the Dust Diseases Tribunal Rules 2019, the third defendant to provide verified discovery of the classes of documents as set out in Annexure C to the Notice of Motion filed 6 July 2022, within 28 days of this date.
- (3) Pursuant to Part 21 of the Uniform Civil Procedure Rules 2005 and Rule 4 of the Dust Diseases Tribunal Rules 2019, the fourth defendant to provide verified discovery of the classes of documents as set out in paragraphs 7 to 10 of Annexure D to the Notice of Motion filed 6 July 2022, within 28 days of this date.
- (4) The first, third and fourth defendants are to pay the plaintiff's costs of the Motion.
- (5) Matter listed part-heard before me for further directions at 10 am on 19 September 2022.
- (6) If the parties seek an alternate costs order, I ask that my Associate be notified within 21 days of this date.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/182a991d56e3170e0e99b7eb>

Badenoch v Granite Transformations Pty Limited & Ors [2022] NSWDDT 8 (Judge Strathdee)

Decision date:

7 December 2022

Key Issues:

- Whether an order for discovery is appropriate in circumstances where the plaintiff has approached the Court for a hearing date.
- Whether the documents sought are relevant to facts in issue.

Decision:

- (1) The first defendant provide verified discovery of the following documents by 16 January 2023, unless previously provided formally or otherwise:
 - (a) Any employment records of the plaintiff and/or sub-contract agreement with the plaintiff at the Clayton Workshop at 57 Sarton Road, Clayton North, Victoria, (Clayton Workshop) or Sunshine Workshop at factory 5, 42-46 Vella Drive, Sunshine West, Victoria (Sunshine Workshop) during the period from 1 January 2001 until 31 December 2003;
 - (b) Any records relating to the plaintiff's work for the first defendant and/or at the premises of the first defendant, whether via AJ Recruitment or otherwise, during the period from 1 January 2001 until 31 December 2003;
 - (c) Any franchise or other agreement between the first defendant and:
 - GT Business Pty Limited;
 - GT Business Holdings Pty Limited;
 - Hotel 25 Pty Limited;
 - Cabritt Pty Limited;
 - Granite Transformations Sunshine;
 - Granite Transformations North Shore; and/or
 - Trend S.p.A;in force during the period from 1 January 2001 until 31 December 2003;
 - (d) Any records documenting the relationship between first defendant and any other entity for which the plaintiff alleges that he undertook duties;
 - (e) Any documents and/or agreements relating to the supply and/or facilitation of supply of granite by the first defendant to:
 - GT Business Pty Limited;
 - GT Business Holdings Pty Limited;
 - Hotel 25 Pty Limited;

- Cabritt Pty Limited;
- Granite Transformations Sunshine; and/or
- Granite Transformations North Shore;

during the period from 1 January 2001 until 31 December 2003;

- (f) Any documents and/or agreements relating to the supply and/or facilitation of supply of granite manufactured by Trend S.p.A, during the period from 1 January 2001 until 31 December 2003;
- (g) Any documents relating to any and all use of the name or trademark "Granite Transformations" during the period from 1 January 2001 until 31 December 2003;
- (h) Any documents relating to any and all use of the name or trademark "Rocksolid Granit" during the period from 1 January 2001 until 31 December 2003;
- (i) Any documents relating to the training and/or accreditation of the Plaintiff from 1 January 2002 – 31 December 2023;
- (j) Any product manuals, notices, warnings and or safety data sheets pertaining to any engineered and natural stone products used at the Clayton Workshop and the Sunshine Workshop from 1 January 2002 – 31 December 2003;
- (k) Any receipts and invoices relating to all engineered and natural stone products purchased and/or used at the Clayton Workshop and the Sunshine Workshop during the period from 1 January 2001 until 31 December 2003;
- (l) Any documents relating to:-
 - (i) The first defendant's knowledge and means of knowledge of possible risk of injury from inhalation of dust including silica dust, during the period up to 31 December 2005;
 - (ii) Any information and/or warnings provided to the Plaintiff or other workers carrying out fabrication and/or installations of silica containing engineered or natural stone products at the Clayton Workshop and the Sunshine Workshop during the period from 1 January 2001 until 31 December 2003;
 - (iii) The provision of any personal protective equipment (PPE) to workers including the plaintiff, including the types of PPE supplied and the date of its provision, during the period from 1 January 2001 until 31 December 2003;
 - (iv) Any reports or records regarding occupational hygiene (and/or health and safety) regarding the risk of injury from inhalation of dust including silica dust and the measures by which that risk might be minimised or obviated, during the period from 1 January 2001 until 31 December 2003;
 - (v) Any evidence of air monitoring at the Clayton Workshop and the Sunshine Workshop during the period from 1 January 2001 until 31 December 2003;

- (vi) Any evidence of health surveillance of workers at the Clayton Workshop and the Sunshine Workshop during the period from 1 January 2001 until 31 December 2003;
 - (vii) Any evidence of factory design, tools, machinery or fabrication methods implemented in order to protect workers including the Plaintiff from the risks of exposure to respirable crystalline silica dust (RCSD) during the period from 1 January 2001 until 31 December 2003;
 - (viii) Any records or reports relating to interactions with relevant workplace health and safety authorities and/or health and safety advisors during the period from 1 January 2001 until 31 December 2003.
- (2) Costs of the Motion to be costs in the cause.
 - (3) Matter listed for directions on 13 February 2023.
 - (4) Liberty to apply.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/184e9ff7939c09f4e3c4a7c5>

Jurisdiction

Badenoch v Granite Transformations Pty Ltd [2022] NSWDDT 1 (Judge Russell SC)

Decision date:

17 March 2022

Key Issues:

- Whether the Tribunal has jurisdiction to hear the plaintiff's claim.
- Whether the plaintiff suffers from a dust-related condition within the meaning of the *Dust Diseases Act 1989* (NSW).
- Whether silica-induced lymphadenopathy is a pathological condition of the lungs that is attributable to dust.
- Whether the proceedings are an abuse of process of the court.
- Whether the proceedings are so obviously untenable that they cannot possibly succeed.

Decision:

- (1) Dismiss the Notice of Motion filed by the first defendant on 11 February 2022.
- (2) Order the first defendant to pay the costs of the plaintiff relating to the Notice of Motion.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/17f9084d543bc0bbd1871d71>

Court of Appeal Proceedings

Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt

[2022] NSWCA 151

Brereton JA

Beech-Jones JA

Mitchelmore JA

Decision Date:

23 August 2022

Background:

- Mr Gatt commenced proceedings against Amaca Pty Limited (Under NSW administered winding up) (“Amaca”) in the Dust Diseases Tribunal of NSW, alleging he was exposed to asbestos dust and fibre whilst employed by Amaca at its Camellia factory and plant between 1962 and 1964, and suffered injuries including asbestosis and lung cancer.
- Key issues in the primary proceedings were:
 - diagnosis of asbestosis;
 - causation with respect to lung cancer.
- It was held that Mr Gatt developed asbestosis and lung cancer from his exposure to asbestos dust and fibre whilst employed by Amaca. Damages were awarded to Mr Gatt’s estate (Mr Gatt having passed away prior to hearing). See *Roseanne Cleary as the as the Legal Personal Representative of the Estate of the late Fortunato (aka Frank) Gatt v Amaca Pty Ltd [2021] NSWDDT 5*.
- Amaca appealed to the New South Wales Court of Appeal.

Key Issues:

- Whether the primary judge erred in law in not accepting unchallenged expert evidence adduced by the appellant, in circumstances where the experts were not cross-examined, and the evidence was contrary to the evidence adduced by the respondent (*Browne v Dunn*).
- Whether the primary judge erred in law in failing to draw an inference that the evidence of Dr Snodgrass would not have assisted the respondent’s case, where the respondent failed to call Dr Snodgrass (*Jones v Dunkel*).
- Whether the primary judge erred in law in applying the wrong test for causation.
- Whether the primary judge erred in law in failing to apply an issue of a general nature that the appellant contended was determined in *Judd v Amaca Pty Ltd [2003] NSWDDT 12*.
- Whether the primary judge erred in law in failing to “address a substantial and clearly

articulated case” advanced by the appellant.

Decision:

- (1) Appeal dismissed.
- (2) The Appellant pay the Respondent’s costs of the appeal.

The full judgement can be accessed at the below link:

<https://www.caselaw.nsw.gov.au/decision/182a8e78f2f7af43a34f9455>