



Dust Diseases Tribunal of New South Wales

2024 Year in Review

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Assessment of Damages

Bradley v Amaca Pty Ltd [2024] NSWDDT 1

Judge Strathdee, 9 February 2024

Assessment of damages for the mesothelioma claim of the plaintiff who worked as an apprentice carpenter and joiner and as a self-employed carpenter. The only issue to be determined was quantum.

Key Issues

- Whether vicissitudes should be applied when assessing damages for future care and medical and other expenses? *Avopiling Pty Ltd v Bosevski* [2018] NSWCA 146; 98 NSWLR 171.
- Assessment of damages:
 - General Damages
 - Interest on General Damages
 - Loss of Expectation of Life
 - Past and future out-of-pocket expenses
 - Future medical expenses
 - Future care and assistance

Found: A discount for vicissitudes is not appropriate in these proceedings. *Avopiling* distinguished.

Held: The orders of the Tribunal are:

- (1) Judgment for the plaintiff in the sum of \$832,402.12.
- (2) The defendant is to pay the plaintiff's costs of the proceedings and such costs on an indemnity basis on and from 8 December 2023 to date.

Davis v Amaca Pty Ltd [2024] NSWDDT 2

Judge Russell SC, 22 February 2024

Assessment of damages for the mesothelioma claim of the plaintiff who was employed as a carpenter in South Australia and Queensland and worked as a self-employed carpenter in Queensland. The only issue to be determined was quantum.

Key Issues

- Assessment of damages where exposure occurred in both South Australia and Queensland. Choice of law rule: *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36; (2000) 203 CLR 503.
- Assessment of damages:
 - General Damages
 - Interest on Past General Damages

- Loss of Expectation of Life
- Past and future out-of-pocket expenses
- Future care

Held: The orders of the Tribunal are:

- (1) Judgment for the plaintiff against the defendant for \$897,020.64.
- (2) Order the defendant to pay the plaintiff's costs.

Keogh v CPB Contractors Pty Ltd & Ors (No 2) [2024] NSWDDT 9

Judge Russell SC, 25 July 2024

Claim by a plaintiff for damages for coal workers pneumoconiosis, silicosis, mixed dust pneumoconiosis, COPD, emphysema and psychiatric injuries said to be attributable to exposure to dust while working in coal mines in Queensland and New South Wales.

Key Issues:

- Whether the plaintiff's respiratory diseases and/or psychiatric conditions are divisible or indivisible?
- Whether smoking caused the plaintiff's COPD?
- Whether the operation of s 306H of the *Workers Compensation and Rehabilitation Act 2003* (Qld) prevents the plaintiff from being entitled to claim damages for future paid services?

In relation to the NSW statutory damages regime applicable to coal miners:

- Whether the plaintiff's claim against the fifth defendant was statute barred by the operation of s 151D(2) of the *Workers Compensation Act 1987* (NSW) (**WCA**)?
- Whether the Tribunal may award provisional damages against the fifth defendant?
- What was the applicable definition of "injury" in the present case and whether the plaintiff was required to prove that his employment with the fifth defendant was a "contributing factor" or "the main contributing factor" to his contracting the diseases?
- What was the date of injury and what was the effect of s 15 of the WCA?
- Whether the plaintiff met the threshold requirement under s 151G of the WCA?
- Whether the plaintiff met the "serious injury" threshold under s 151H of the WCA?
- Whether there is a cap on damages for past and future economic loss under s 151I of the WCA and whether the plaintiff was entitled to a separate award for loss of superannuation?
- Whether the plaintiff had failed to mitigate his damages by failing to undergo medical treatment for his psychological injury or to manage his smoking and alcohol consumption?
- Whether interest should be payable on heads of damage other than past economic loss by the fifth defendant (s 151M(4) of the WCA)?
- Assessment of damages:
 - General Damages

- Interest on past General Damages
- Loss of life expectancy
- Past and future out of pocket expenses
- Future care and assistance
- Past and future economic loss
- Past and future superannuation loss
- *Fox v Wood* damages
- Whether the court is required to apportion damages and costs under s 151S of the WCA?

Held: The orders of the Tribunal are:

- (1) Judgment for the plaintiff against the first defendant in relation to mine dust exposure at the Poitrel and Moorvale Mines for \$1,066,922.11, of which \$830,800.00 is attributable to mine dust exposure at the Poitrel Mine and \$236,122.11 is attributable to mine dust exposure at the Moorvale Mine.
- (2) Judgment for the plaintiff against the second defendant in relation to mine dust exposure at the Moorvale Mine for \$236,122.11.
- (3) Judgment for the plaintiff against the third defendant in relation to mine dust exposure at the Boggabri Mine for provisional damages of \$1,687,264.74.
- (4) Order that the dust-related conditions in respect of which an award of further damages may be made against the third defendant (arising from mine dust exposure at the Boggabri Mine) are:
 - (a) Rheumatoid arthritis.
 - (b) Scleroderma.
 - (c) Progressive massive fibrosis.
 - (d) Lung cancer.
- (5) In addition to order (3) above, judgment for the plaintiff against the third defendant in relation to mine dust exposure at the Blackwater Mine for \$326,489.82.
- (6) Judgment for the plaintiff against the fifth defendant in relation to mine dust exposure at the Boggabri Mine for provisional damages of \$783,963.46.
- (7) Declare that 100% of the sum awarded by the judgment against the fifth defendant is damages to which Part 3 Division 5 of the *Workers Compensation Act 1987* (NSW) applies.
- (8) Order that the dust-related conditions in respect of which an award of further damages may be made against the fifth defendant (arising from mine dust exposure at the Boggabri Mine) are:
 - (a) Rheumatoid arthritis.
 - (b) Scleroderma.
 - (c) Progressive massive fibrosis.
 - (d) Lung cancer.
- (9) Order the first, second, third and fifth defendants to pay the costs of the plaintiff.
- (10) Judgment for the fifth defendant against the third defendant on the Amended Fifth Cross Claim in relation to mine dust exposure at the Boggabri Mine for \$548,774.42.

- (11) Order the third defendant to pay the costs of the fifth defendant of and incidental to the Amended Fifth Cross Claim.
- (12) Grant leave to all defendants to file cross claims within 28 days, if so advised. If any further cross claims are filed, the parties are to inform my Associate so that the cross claims can be listed before me for case management.
- (13) Liberty to restore the proceedings before me if any party seeks a different costs order based upon an Offer of Compromise or other offer.

Civil Procedure

Topalovic v BlueScope Steel (AIS) Pty Ltd [2024] NSWDDT 7

Judge Scotting, 11 June 2024

Application by the defendant to have the matter removed from the Claims Resolution Process.

Key Issue

- Whether the matter should be removed from the Claims Resolution Process (**CRP**) due to the plaintiff's failure to comply with a requirement of the CRP (cl 20(1)(c) of the *Dust Diseases Tribunal Regulation 2019* (NSW))?

Held: The orders of the Tribunal are:

- (1) Pursuant to cl 20(1)(c) of the *Dust Diseases Tribunal Regulation 2019*, the proceedings are removed from the Claims Resolution Process.
- (2) I will hear from the parties as to the appropriate directions to be made to bring the matter to mediation as soon as practicable.
- (3) The plaintiff is to pay the costs of the Notice of Motion and the costs thrown away by the refusal to attend the medical examination with Professor McKenzie on 29 May 2024.
- (4) I grant liberty to either party to seek a different costs order.

O'Malley v BlueScope Steel (AIS) Pty Ltd [2024] NSWDDT 8

Judge Russell SC, 28 June 2024

Application by first defendant seeking an order for separate representation.

Background:

- The plaintiff brought a claim for a divisible injury against BlueScope Steel (AIS) Pty Ltd (**BlueScope**) and three other defendants.
- The plaintiff alleged that he was employed by BlueScope at Port Kembla Steelworks and later at Wongawilli Colliery.
- The solicitor acting for BlueScope filed a Motion seeking an order for separate representation for BlueScope in respect of the Wongawilli Colliery period of employment on the basis of an irreconcilable conflict.
- The order was opposed by the plaintiff.

Key Issue:

- Whether an order should be made for separate representation for BlueScope where the solicitor acting for BlueScope asserted that they have a conflict of interest?

Held: The orders of the Tribunal are (ex tempore):

- (1) Order that Sparke Helmore be granted leave to separately appear in the interests of Coal Mines Insurance, to defend the plaintiff's claim arising from his alleged exposure to

respirable coal and/or respirable silica dust whilst employed by the First Defendant, BlueScope Steel (AIS) Pty Ltd, at the Wongawilli Colliery.

(2) Costs reserved left to the discretion of the trial judge to be appointed to hear and determine the proceedings.

Smith v CSR Limited & Ors [2024] NSWDDT 14

Judge Russell SC, 21 November 2024

Application by the plaintiff to set aside subpoena issued by the fourth defendant.

Key issues:

- Whether there was a legitimate forensic purpose for the issuing of the subpoena?
- Whether the subpoena should be set aside?
- Whether the fourth defendant should have a costs order against the plaintiff?

Held: The orders of the Tribunal are:

- (1) Dismiss the Notice of Motion filed by the plaintiff on 29 October 2024.
- (2) Order each party to pay his or its own costs of the Notice of Motion.

Bakulev v Bluescope Steel (AIS) Pty Ltd [2024] NSWDDT 15

Judge Russell SC, 21 November 2024

Application by the defendant seeking review of the Registrar's decision not to refer for a fresh determination of apportionment and seeking an order directing the Registrar to make a referral to a new Contributions Assessor for a fresh Determination of Apportionment.

Key issue:

- Whether the Tribunal has jurisdiction to review the decision of the Registrar while the claim is subject to the CRP?

Held: The orders of the Tribunal are:

- (1) Dismiss the Notice of Motion filed by the defendant on 7 November 2024.
- (2) Order each party to pay his or its own costs of the Notice of Motion.

Costs

Keogh v CPB Contractors Pty Ltd & Ors (No 3) [2024] NSWDDT 10

Judge Russell SC, 9 October 2024

Application by the first, second and third defendants to amend the assessed damages and vary the costs ordered in favour of the plaintiff.

Background:

- In these proceedings, judgment was delivered in favour of the plaintiff against the defendants.
- The first, second and third defendants paid the plaintiff the damages awarded less the amount of workers compensation benefits the plaintiff had received from WorkCover Queensland (as the insurer of the first, second and third defendants).
- The issue was not raised at trial.

Key Issues:

- Whether damages ordered against the first, second and third defendants should be reduced by reason of workers compensation payments made by WorkCover Queensland to the plaintiff?
- Whether the costs ordered in favour of the plaintiff against the first, second and third defendants should be varied because of s 316 of the *Workers Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**)?
- Whether s 316 of the WCRA is substantive or procedural law?

Found:

- There is no need to amend the assessed damages because of the agreement reached between the parties.
- Section 316 of the WCRA is to be regarded as procedural law.

Held: The orders of the Tribunal are:

- (1) Dismiss the application made by the second defendant, and the first and third defendants in respect of their liability to the plaintiff as an employer in Queensland (the Applicants), for a variation of the existing costs orders.
- (2) Order the Applicants for the variation to pay the plaintiff's costs of an incidental to the application.

Keogh v CPB Contractors Pty Ltd & Ors (No 4) [2024] NSWDDT 12

Judge Russell SC, 16 October 2024

Application by the fifth defendant to vary the costs ordered in favour of the plaintiff.

Background:

- In these proceedings, judgment was delivered in favour of the plaintiff against the defendants.
- Orders 10 and 11 in the primary judgment dealt with the cross claim for contribution brought by the fifth defendant against the third defendant.
- The costs order on the cross claim (Order 11) was subsequently varied to add the words “including 70% of the costs payable by the Fifth Defendant to the Plaintiff under Order 9 made on 24 July 2024”.

Key Issues:

- Whether costs awarded in favour of the plaintiff against the fifth defendant should be apportioned pursuant to s 151S(2) of the *Workers Compensation Act 1987* (NSW)?

Held: The orders of the Tribunal are:

- (1) Dismiss the application based upon s 151S of the *Workers Compensation Act 1987* (NSW), made by the fifth defendant, for a variation of the existing costs orders.
- (2) Order the fifth defendant to pay the costs of the plaintiff and the third defendant (re the Boggabri Mine) of and incidental to the application.

Franklin v Coal Mines Insurance Limited (No 2) [2024] NSWDDT 13

Judge Russell SC, 18 November 2024

This judgment concerns the costs of the plaintiff's application for leave to proceed against Coal Mines Insurance Limited (CMI).

Background:

- The plaintiff filed an Amended Notice of Motion seeking orders to be granted leave to continue proceedings against CMI.
- The plaintiff sought information regarding the existence of relevant insurance policies from CMI.
- The plaintiff was not provided with timely answers to reasonable requests for information.

Key Issues:

- Whether costs of the plaintiff's application for leave to proceed against CMI should follow the event?

Held: The orders of the Tribunal are:

- (1) Order that the first defendant pay the plaintiff's costs of and incidental to the plaintiff's application for leave to proceed against the first defendant.

Discovery

Saroo v Workers Compensation Nominal Insurer & Ors [2024] NSWDDT 4

Judge Russell SC, 17 May 2024

This ruling concerns a Notice of Motion filed on behalf of the plaintiff seeking orders for verified discovery of classes of documents from multiple defendants in a silicosis case.

Key Issues

- Whether documents discovered by the third and tenth defendants in similar claims or previous proceedings in relation to exposure to respirable crystalline silica dust (Class 4) are relevant to a fact in issue or unduly broad and oppressive?
- Whether the fourth defendant's Annual Reports (Class 6) are relevant to a fact in issue?
- Whether documents of the third, fourth and tenth defendants relating to marketing or promotional expenditure (Class 9) are relevant to a fact in issue?
- Whether documents of the third defendant relating to the composition of its engineered stone products (Class 10) are relevant to a fact in issue where the third defendant has already produced material safety data sheets for its products?
- The plaintiff sought documents of the third, fourth and tenth defendants relating to the supply of engineered stone products to particular parties (Class 12). Whether the category was too broad? Whether the documents are relevant to an issue in dispute?

Held: Orders in summary -

- The third and tenth defendants to provide verified discovery of Class 4 documents.
- The fourth defendant to provide verified discovery of its Annual Reports (Class 6 documents).
- The third defendant to provide verified discovery of Class 10 documents.
- The third, fourth and tenth defendants to provide verified discovery of Class 12 documents with limitations.
- His Honour found that the documents described in Class 9 were not relevant to a fact in issue and declined to order that the defendants provide verified discovery of Class 9 documents.
- Further orders to provide verified discovery of classes of documents by the third, fourth, seventh, eighth and tenth defendants made by consent.
- Each party contesting the Notice of Motion to pay his or its own costs.

Evidence

Keogh v CPB Contractors Pty Ltd & Ors [2024] NSWDDT 3

Judge Russell SC, 8 April 2024

This ruling concerns a procedural issue regarding an objection to the plaintiff's evidence in chief being given by means of affidavit.

Background:

- At hearing the plaintiff's counsel sought to tender affidavits by the plaintiff which went to the issues of exposure and quantum of damages.
- The defendant objected to the plaintiff's evidence being given by means of affidavit.

Key Issue:

- Whether the plaintiff's evidence in chief may be given by means of affidavit, in circumstances where the plaintiff has significant emotional and psychiatric issues.

Held: The plaintiff may give his evidence in chief by affidavit.

Aviga v Boral Resources (Country) Pty Ltd [2024] NSWDDT 5

Judge Strathdee, 17 May 2024

This ruling concerns a procedural issue regarding the nomination of experts.

Background:

- Prior to mediation the plaintiff served the evidence of Dr Burdon, respiratory physician, on the defendant. Following the failed mediation the plaintiff sought an opinion from Professor Yates, respiratory physician, which was also served on the defendant.
- The defendant subsequently filed a Notice of Motion seeking an order that the plaintiff only be permitted to rely on the evidence of Dr Burdon.

Key Issues:

- Whether the Tribunal has the power to give a direction that would restrict a party's choice of expert?
- Whether the plaintiff's reliance on Professor Yates over Dr Burdon would cause substantial prejudice to the defendant?
- Whether the order sought by the defendant would be in the interests of justice?

Held - Orders in summary: The Notice of Motion was dismissed and the question of costs was reserved for the trial judge.

Leave to Commence Proceedings against Insurer

Sako v Workers Compensation Nominal Insurer [2024] NSWDDT 6

Judge Scotting, 11 June 2024

The plaintiff sought leave to continue proceedings against the Workers Compensation Nominal Insurer (WCNI), in respect of the liability of an uninsured employer of the plaintiff, pursuant to the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW).

Background:

- The plaintiff brought proceedings against six defendants alleging that he contracted silicosis and a psychological injury from his exposure to respirable crystalline silica during three periods of employment.
- The plaintiff's employers in relation to the second and third periods of employment were insured under the *Workers Compensation Act 1987* (NSW) (**1987 Act**) but were no longer in existence. It was common ground that leave should be granted to the plaintiff to continue the proceedings against WCNI relating to those employers under the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW).
- The employer related to the first period of employment was uninsured. The plaintiff contended that he was able to make a claim on WCNI in relation to the uninsured employer under s 140 of the 1987 Act, and sought leave to amend his Statement of Claim accordingly.
- WCNI submitted that a grant of leave to continue proceedings against it in relation to the uninsured employer would be futile, because on a proper construction, a claim relating to a dust disease is excluded from the workers compensation legislation.

Key Issue

- Whether the plaintiff's claim against WCNI meets the threshold for a grant of leave under s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW)?
- Whether the plaintiff had an arguable case against WCNI?

Held: The orders of the Tribunal are -

- (1) I grant leave to the plaintiff to continue the proceedings against the sixth defendant pursuant to s 5 *Civil Liability (Third Party Claims Against Insurers) Act 2017*.
- (2) I grant leave to the plaintiff to file the Amended Statement of Claim annexed and marked "A" to the Notice of Motion.
- (3) Costs of the motion are costs in the cause.

NOTE: WCNI appealed to the Court of Appeal. See ***Workers Compensation Nominal Insurer v Sako [2025] NSWCA 12***. The orders of the Court of Appeal (Stern and McHugh JJA, Price AJA) included that Order (2) made by Scotting J on 11 June 2024 be set aside and that the plaintiff be refused leave to file the draft Amended Statement of Claim annexed to his notice of motion.

Franklin v Coal Mines Insurance Ltd & Ors [2024] NSWDDT 11

Judge Russell SC, 16 October 2024

The plaintiff sought leave to proceed against Coal Mines Insurance Limited (CMI) and the Workers Compensation Nominal Insurer (WCNI) as the insurers of deregistered companies pursuant to the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW). CMI opposed the grant of leave. An order was made by consent granting leave to sue WCNI.

Key Issues:

- Whether the plaintiff in seeking leave to proceed against CMI pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), had established the following elements in s 4 (*Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (In Liq)* [2018] NSWSC 161):
 - There is an insurer in existence.
 - The insurer has issued a policy to the relevant defendant.
 - The policy covers the risk.
 - The policy was in place at the time of the risk.
- Whether CMI was the insurer on risk for each deregistered company?
- Whether there existed an appropriate policy of insurance which was current on the plaintiff's last day of work for each of the deregistered companies?
- Whether the work the plaintiff did for each deregistered company fell within the description of the business covered by the policy?
- Whether s 7A of the *Workers Compensation Act 1987* (NSW) applies where there is no CMI policy in place as at the last date of employment?

Held: The orders of the Tribunal are:

- (1) Subject to order (2) grant leave nunc pro tunc to commence and continue these proceedings against the first defendant Coal Mines Insurance Ltd in relation to the claims pleaded in the Second Further Amended Statement of Claim against deregistered companies.
- (2) Decline to grant such leave in relation to the claim pleaded in pars 95-103 of the Second Further Amended Statement of Claim.
- (3) Reserve the costs of and incidental to the Amended Notice of Motion filed on 25 June 2024.

Black v Luke and Singer Pty Ltd [2024] NSWDDT 16

Judge Russell SC, 29 November 2024

The plaintiff sought leave to proceed against QBE Insurance (Australia) Ltd as the insurer of a deregistered company pursuant to the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW).

Background:

- The plaintiff's Statement of Claim, Amended Statement of Claim and proposed Further

Amended Statement of Claim gave the impression that the plaintiff's exposure to asbestos occurred up until 1980.

- The plaintiff's Statement of Particulars said that his exposure to asbestos occurred between 1962 and 1969.
- An application for leave to amend the Statement of Claim in the form of a further version of the Further Amended Statement of Claim which pleaded exposure from 1962 to 1969, was made by an oral application at the hearing of the Notice of Motion.

Key Issue:

- Whether leave should be granted to the plaintiff to amend his pleadings in accordance with the proposed Further Amended Statement of Claim?
- Whether QBE was the insurer for the plaintiff's employer on the last date relevant to s 151AB of the *Workers Compensation Act 1987* (NSW)?

Held: The orders of the Tribunal are -

- (1) Grant leave to the plaintiff pursuant to ss 4 and 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) to bring proceedings against QBE Insurance (Australia) Ltd.
- (2) Order that QBE Insurance (Australia) Ltd be substituted for the first defendant in these proceedings.
- (3) Grant leave to the plaintiff to file a Further Amended Statement of Claim in the form of Exhibit PX 4.
- (4) Order that the plaintiff pay the costs of QBE Insurance (Australia) Ltd of and incidental to the Notice of Motion filed on 19 September 2024.

Court of Appeal Proceedings

[Coveney v Asbestos Injuries Compensation Fund Ltd; Davis v Asbestos Injuries Compensation Fund Ltd; WorkCover Queensland v Asbestos Injuries Compensation Fund Ltd \[2024\] NSWCA 317](#)

Ward P, Leeming JA and Payne JA, 11 June 2024

Background:

Decision under appeal - Re Asbestos Injuries Compensation Fund Ltd (and WorkCover Queensland) [2024] NSWSC 1163

- On 13 September 2024, her Honour Rees J, provided judicial advice on whether Asbestos Injuries Compensation Fund Ltd (**AICF**), as trustee of the special purpose fund (**SPF**) established by the James Hardie Group to pay asbestos related claims against former subsidiaries, can make a payment out of the SPF that will go directly or indirectly to reimburse workers compensation payments made by WorkCover Queensland (**WCQ**) under the *Workers Compensation and Rehabilitation Act 2003* (Qld), in circumstances where a judgment sum has been obtained by a claimant against a Liable Entity (in this instance, Amaca Pty Ltd), and the claimant had obtained workers' compensation payments from WCQ for the same injury.
- The issue was debated with regard to two test cases, which were claims brought by Messrs Coveney and Davis in the Dust Diseases Tribunal of NSW.

Held: The orders of the Court are -

- (1) Order pursuant to s 55 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) and s 63 of the *Trustee Act 1925* (NSW) that the plaintiff would be justified in not paying the sum of \$873,720 to either WorkCover Queensland under s 207B(4) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) or Eric Thomas Coveney in satisfaction of the judgment against Amaca Pty Ltd (under NSW Administered Winding Up) (ACN 000 035 512) in proceeding number 2023/255894 in the Dust Diseases Tribunal of New South Wales (the *Coveney Proceeding*).
- (2) Further order pursuant to s 55 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) and s 63 of the *Trustee Act 1925* (NSW) that the plaintiff would be justified in not paying the sum of \$316,280 to Eric Thomas Coveney in satisfaction of the judgment against Amaca Pty Ltd (under NSW Administered Winding Up) (ACN 000 035 512) in the Coveney Proceeding in circumstances where WorkCover Queensland would or could enforce its statutory charge under s 207B(2) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) over that sum.
- (3) Order pursuant to s 55 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) and s 63 of the *Trustee Act 1925* (NSW) that the plaintiff would be justified in not paying the sum of \$418,640 to WorkCover Queensland under s 207B(4) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) or Barry Edward Davis in satisfaction of the judgment against Amaca Pty Ltd (under NSW Administered Winding Up) (ACN 000 035 512) in proceeding number 2023/232314 in the Dust Diseases Tribunal of New South Wales (the *Davis Proceeding*).

- (4) Order that the plaintiff be indemnified for its costs from the “SPF” as defined in *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW).
- (5) In the event that any other party seeks a costs order in their favour:
 - (a) direct that party to file and serve any affidavits and submissions (limited to 3 pages) within 7 days;
 - (b) direct the plaintiff to file and serve any affidavits and submissions in reply (limited to 3 pages for each party’s submissions filed under sub-order (a)) within 14 days;
such application to be determined on the papers.
- (6) Parties to notify any errors or omissions within 7 days.

Her Honour made a costs order on 3 October 2024 (*In the matter of Asbestos Injuries Compensation Fund Limited (and WorkCover Queensland) (No 2)* [2024] NSWSC 1238).

Appeal to the Court of Appeal:

Mr Coveney, Mr Davis and WCQ appealed to the Court of Appeal.

- The court found that as non-parties to the original proceedings, the appeals were subject to the grant of leave and that as the appeals presented questions of law which were of general importance, the granting of leave was warranted.
- The main ground of appeal concerned the her Honour Rees J’s advice that the trustee was justified in not making a payment to discharge the portion of Amaca’s judgment debt up to the amount of workers compensation payments received by Mr Coveney and Mr Davis, because of a lack of power to make payments to the extent that the men had received payments of workers compensation from WCQ.

Held: The orders of the Court are -

In proceeding 2024/390046 commenced by Mr Coveney:

- (1) Join the Attorney-General of New South Wales as the second respondent.
- (2) Join James Hardie 117 Pty Ltd as the third respondent.
- (3) Join WorkCover Queensland as the fourth respondent.
- (4) Grant leave to appeal.
- (5) Order that the notice of appeal already filed by Mr Coveney in proceeding 2024/362958 be taken as the appeal filed in proceeding 2024/390046.
- (6) Appeal allowed.
- (7) Set aside the orders made by the primary judge on 13 September 2024 and 3 October 2024.
- (8) Direct the parties to supply agreed short minutes of order, or in lieu of agreement, minutes of the orders for which they contend accompanied by submissions not exceeding four pages, by 7 February 2025, and submissions in reply not exceeding three pages by 14 February 2025, with a view to orders thereafter being made without further hearing.

In proceeding 2024/373482 commenced by Mr Davis:

- (1) Join the Attorney-General of New South Wales as the second respondent.
- (2) Join James Hardie 117 Pty Ltd as the third respondent.

- (3) Join WorkCover Queensland as the fourth respondent.
- (4) Grant leave to appeal.
- (5) Direct Mr Davis to file a notice of appeal in accordance with the draft notice of appeal, and dispense with the requirements as to service.
- (6) Appeal allowed.
- (7) Set aside the orders made by the primary judge on 13 September 2024 and 3 October 2024.
- (8) Direct the parties to supply agreed short minutes of order, or in lieu of agreement, minutes of the orders for which they contend accompanied by submissions not exceeding four pages, by 7 February 2025, and submissions in reply not exceeding three pages by 14 February 2025, with a view to orders thereafter being made without further hearing.

In proceeding 2024/372881 commenced by WorkCover Queensland:

- (1) Join the Attorney-General of New South Wales as the second respondent.
- (2) Join James Hardie 117 Pty Ltd as the third respondent.
- (3) Grant leave to appeal.
- (4) Direct WorkCover Queensland to file a notice of appeal in accordance with the draft notice of appeal, and dispense with the requirements as to service.
- (5) Appeal allowed.
- (6) Set aside the orders made by the primary judge on 13 September 2024 and 3 October 2024.
- (7) Direct the parties to supply agreed short minutes of order, or in lieu of agreement, minutes of the orders for which they contend accompanied by submissions not exceeding four pages, by 7 February 2025, and submissions in reply not exceeding three pages by 14 February 2025, with a view to orders thereafter being made without further hearing.

Note: The Court of Appeal delivered a decision on costs on 3 March 2025 (*WorkCover Queensland v Asbestos Injuries Compensation Fund Ltd (No 2)* [2025] NSWCA 29).