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Dust Diseases Tribunal of New South Wales Decisions

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(Re: Mowbray) Brambles Holdings Ltd v British American Tobacco Services Ltd [2002] NSWDDT 16 (17 September 2002)

Last Updated: 21 May 2003

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION: (Re:  Mowbray ) Brambles Holdings Ltd v British American  Tobacco  Services Ltd [\[2002\] NSWDDT 16](#)

PARTIES:

Brambles Holdings Ltd

British American  Tobacco  Services Ltd

CASE NUMBER: 176 of 2001CC1 of 2002.00

CATCH WORDS:

LEGISLATION CITED:

Dust Diseases Tribunal Act s 13(6), s 11(1), s 11(4), s 25(3), s 25(a) & s 25(b)

Supreme Court Rules Pt 40r1 & Pt 40r9

LR (MP) Act s 5

CORAM: O'Meally P

DATES OF HEARING: 17/09/02



EX TEMPORE DATE: 17/09/2002

LEGAL REPRESENTATIVES



COUNSEL: Mr R J Burbidge QC with Mr M J Heath for the cross-claimant
SOLICITORS: Hickson Wisewoulds

COUNSEL: Mr B W Walker SC with Ms R Sofroniou for the cross-defendant
SOLICITORS: Corrs Chambers Westgarth







JUDGMENT:

1. This is a motion on notice brought by British American  **Tobacco**  Australia Services Ltd (BAT) pursuant to s 13(6) of the Dust Diseases Tribunal Act, seeking orders that the Tribunal reconsider or rescind its decision granting leave to Brambles Holdings Ltd (Brambles) to issue a cross-claim against it. Certain consequential orders are also sought. In the alternative, pursuant to Pt 40 r 1 or Pt 40 r 9 of the Supreme Court Rules, which have been adopted and apply in the Tribunal, BAT seeks that the Tribunal set aside or discharge the order giving leave to issue a cross-claim, and the other consequential orders referred to.

Background

2. On 8 May 2001 proceedings for damages were commenced in the Tribunal by one Allan  **Mowbray**  (the plaintiff) against Brambles as defendant. The essence of the plaintiff's case was that in the course of his employment by Brambles he was exposed to asbestos dust and fibre, and to diesel dust and fumes, as a result of the inhalation of which he contracted bronchogenic carcinoma.

3. On 20 August 2001 an order was made fixing the hearing of the action before Johns J. Evidence was taken at the plaintiff's home on 3 September 2001. After his evidence was taken further interlocutory steps were directed. On 30 October 2001 Johns J was informed that the plaintiff and defendant had agreed to a compromise. On the same day His Honour granted leave to Brambles to issue cross-claims before 15 December 2001. On 26 November 2001 an extension to 28 February 2002 was granted and on 22 February 2002 a cross-claim was filed by Brambles against BAT. On 23 January 2002 the plaintiff died. Judgment had not been entered, and, following the appointment of a legal personal representative, judgment was entered on 27 February 2002. Thus the cross-claim post-dated the plaintiff's death.

4. A defence to the proceedings brought by the plaintiff was filed on 9 August 2001. The defence included an allegation of contributory negligence based on the plaintiff's smoking. On 31 August 2001 the plaintiff swore an affidavit which became an exhibit before Johns J. Paragraph 35 contains a history of the plaintiff's smoking from the age of 14. He identified two  **tobacco**  brands and recited the duration and quantity of their use. When the plaintiff gave evidence he was cross-examined about his  **tobacco**  use. Relevant to his smoking, cross-examination was brief and was directed to the issue of contributory negligence. The plaintiff did, however, affirm his use of the two  **tobacco**  brands referred to in paragraph 35 of his affidavit.

The Tribunal's jurisdiction

5. The primary jurisdiction of the Tribunal is conferred by s 11(1) of the Dust Diseases Tribunal Act (DDT Act). S 11(1) gives exclusive jurisdiction to the Tribunal to hear and determine proceedings for damages where a person is suffering a dust related condition attributable or partly attributable to a breach of duty owed to the person. S11(4) confers jurisdiction on the Tribunal in respect of ancillary or related matters. S 11 (4) provides:

(4) Any matter that is ancillary or related to a matter that is the subject of proceedings to be brought under subsection (1) may also be included in those proceedings.

A cross claim is an ancillary or related matter: see *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89; (1999) 17 NSWCCR 720. The jurisdiction conferred by S 11 (4) is concurrent with the jurisdiction of the Supreme Court: see *Carnuccio v Cinzano & CIA (Australia) Pty Ltd* [1990] NSWDDT 4; (1990) 6 NSWCCR 70 at 73E; *Energy Australia v Wallaby Grip Ltd* [1998] NSWDDT 3; (1998) 16 NSWCCR 535 at [34]; *Amaca Pty Ltd v CSR Ltd* [2001] NSWSC 263; (2001) 21 NSWCCR 637, at [35] - [38].

6. Though the motion of BAT sought that the cross-claim be struck out for want of jurisdiction, it is now conceded that Brambles' cross-claim is an ancillary matter and the Tribunal has jurisdiction to hear it.

Application under S13(6) DDT Act

7. BAT says, however, that pursuant to s 13(6) of the DDT Act the Tribunal should reconsider or rescind its decision granting leave to issue the cross-claim.

8. The provisions of 13(6) of the DDT Act are unique to the Tribunal. S 13(6) provides:

(6) Wherever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.

In considering the construction and application of s 13(6) Priestley JA in *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 said at 247:

What in its context subsection (6) seems to me to do is to recognise that there may occasionally be very exceptional cases in which it becomes clear that after judgment something of a fundamental kind and of high importance to the litigation has happened, that it has happened in regard to a case which because of the nature of the Tribunal's jurisdiction needs to be dealt with with the greatest available expedition and that it maybe more efficient, rather than leave the supervening and basic matter to be dealt with by the appeal mechanism, to have it dealt with by the Court of first instance.

On this approach it would be very rare for the power under subsection 6 to be properly exercisable by the Tribunal. The power would in my opinion only be one the Tribunal should even consider exercising in the kind of circumstances referred to by Lord Wilberforce in Mulholland, that is, stated shortly, where something basic to the decision had been clearly falsified by subsequent events.

9. Cases in which s 13(6) has been invoked to reconsider a matter, or to amend a decision are rare. I know of no case in which a decision has been rescinded. S 13(6) has been used to correct errors of fact and law. Applications under s 13(6) have been refused where a defendant sought a variation in the award of damages in respect of events following the death of a plaintiff, see for example: *Browne v Cockatoo Dockyard Pty Ltd & Anor* [1999] NSWDDT 19; (1999) 18 NSWCCR 618. It was invoked on an application to vary an order for costs between cross defendants: *Rolls Royce Industrial Power Ltd v James Hardie & Coy Pty Ltd* (No. 5) (2000) 19 NSWCCR 742.

10. The power conferred by s 13(6) should be exercised only in very exceptional circumstances or where the decision in respect of which application is made is manifestly wrong.

11. I do not think it appropriate to invoke s 13(6) to make the orders sought by BAT, nor do I think s 13(6) would authorise the making of those orders.

Application under Pt 40 R1 and Pt 40 R9 Supreme Court Rules

12. The alternative ground upon which BAT seeks that the orders made be set aside is based on Pt 40 r 1

and Pt 40 r 9 (3) and (4) of the Rules. Pt 40 r 1 provides:

(1) The court may, at any stage of any proceedings, on the application of any party, give such judgment or make such order as the nature of the case requires, notwithstanding that the applicant does not make a claim for relief extending to that judgment or order in any originating process.

Pt 40 r 9 provides:

(3) The Court may, on terms, set aside or vary an order -

(a) where the order has been made in the absence of a party, whether or not the absent party is in default of appearance or otherwise in default, and whether or not the absent party had notice of motion for the order; or

(b) where notice of motion for the setting aside or variation is filed before entry of the order.

(4) In addition to its powers under subrules (1), (2) and (3), the Court may, on terms, set aside or vary any order (whether or not part of a judgment) except so far as the order determines any claim for relief or determines any question (whether of fact or law or both) arising on any claim for relief and excepting an order for dismissal of proceedings or for dismissal of proceedings so far as concerns the whole or any part of any claim for relief.

BAT's discretionary argument

13. BAT submits that in the events that have happened I should exercise my discretion to grant the orders it seeks. BAT submits the discretion should be exercised because Brambles knew of the plaintiff's smoking history at least by 9 August 2001 when the defence was filed alleging the plaintiff was guilty of contributory negligence; that Brambles believed the plaintiff's smoking history was relevant to his injury, that is to his carcinoma; that in cross examination Brambles adduced further evidence of matters pertinent to the plaintiff's smoking history; that it contemplated issuing a cross-claim at least by 30 October 2001; and that it knew at all times that the plaintiff's prognosis was poor and his life expectancy was limited. BAT says also that Brambles gave it no notice of the application to issue the cross-claim, nor indeed of the application to extend the time within which it was to be issued. BAT remained ignorant of the cross-claim until it was served late in February 2002, by which time the plaintiff was dead. It says Brambles intentionally shut it out from obtaining evidence from the plaintiff. This was a choice not demanded by the exigencies of the proceedings, since BAT could have been joined at the time Brambles was formulating and filing its defence, and BAT could have taken part in the proceedings and cross-examined the plaintiff on 3 September 2001.

14. BAT submits that Brambles' forensic decision to defer joining it in the proceedings until after the plaintiff's evidence had been taken meant that there would be no testing or challenging of the plaintiff's evidence about smoking, nor could BAT adduce evidence on that matter. As a consequence, it says, it has been disadvantaged and prejudiced in a manner which is irremediable because, by reason of the plaintiff's death, it has been denied the opportunity to call evidence in support of its main defences.









15. BAT submits that Brambles cannot be permitted to rely upon s 11(4) of the DDT Act to maintain its cross-claim whilst at the same time contriving to run proceedings in such a way as to deprive s 11(4) of its purpose with respect to the proceedings. BAT submits the forensic benefits, economies and efficiencies and full participation which s 11(4) is intended to provide have now been lost. It says that should Brambles wish to claim against BAT the appropriate forum is the Supreme Court of New South Wales.

16. BAT specifically and expressly raises no argument that the Tribunal is a *forum non conveniens*, for *forum* in this connection is territorial; neither does it say that Brambles has been guilty of an abuse of



process.

17. Brambles, however, submits that even if the motives and consequences recited above are correct, which it disputes, they provide no basis for making orders sought. But so far as those matters have been relied upon, Brambles says that though leave was given to issue cross-claims on 30 October 2001, it could not be said that it had then concluded its investigations in order to determine against whom such cross-claim or cross-claims might be issued.

18. BAT says the Tribunal should, in the exercise of its discretion, decline to hear the cross-claim because the Supreme Court is a more appropriate forum and in that Court procedural advantages available in the Tribunal which assist the expedition of cases, are neither available nor appropriate for a case such as this.

19. Under the DDT Act the significant procedural advantages available to parties are that historical and general medical evidence given in one case may be admitted in another (s 25(3)); that interrogatories and discovery given in one case may be used in another (s 25A); and that issues of a general nature which have been determined by the Tribunal may not be relitigated or reargued without leave (s 25B). It is said that these procedural provisions would not be and could not be invoked in this case, because if it is determined that the cross-claim should be heard in the Tribunal, it would be the first time that issues of the type raised would be litigated. And thus there is no evidence given in one case which could be admitted on the cross-claim; there are no discovery or interrogatories given in another case which could be used in the cross-claim and no relevant issue previously determined. There is one possible exception. Brambles will allege that cigarette smoke is a dust and therefore BAT is a person who, if sued by the plaintiff, would have been liable in respect of the same damage: see s 5 [Law Reform \(Miscellaneous Provisions\) Act, 1946](#) (LR(MP) Act). In *Stelzer v W.D. & H.O. Wills (Australia) Limited* (unreported, 24 February 1995) Maguire J decided on the evidence before him that cigarette smoke was not a dust, but he was of the view that where an injury was alleged to be the result of the inhalation of both  tobacco  dust and  tobacco  smoke proceedings could be brought in the Tribunal which, as to  tobacco  dust would have jurisdiction under s 11(1) and as to  tobacco  smoke would have jurisdiction under s 11(4) of the DDT Act. It is open to BAT to invoke s 25B and to rely on the decision of Maguire J in *Seltzer*.

Brambles' Response

20. In respect of its failure to notify BAT of the cross-claim Brambles says that even after the plaintiff's evidence was taken it had not established the identity of the cross defendant. The fact is, however, that Brambles was aware of the brand names of two  tobacco  products used by the plaintiff. More significantly, in respect of the opportunity to investigate and identify material facts relevant to the cross-claim said to have been lost to BAT, Brambles says BAT has not indicated what those matters are, and, in any event, no such matters readily can be imagined.

21. Brambles also says that the plaintiff's smoking history, his medical records and his evidence are each available and may be used in the cross-claim. It submits that the only claimed prejudice of BAT is the absence of information which might have been produced by the plaintiff, but, it says, Brambles has no access to information denied to BAT.

22. Brambles also relies upon the absence of conditions attached to the granting of leave to issue cross-claims. Relying on *Seltsam Pty Ltd v Energy Australia & Ors* [1999] NSWCA 89 at [19] Brambles says it has an entitlement to issue cross-claims as of right.

23. As noted, the provisions of Pt 40 R 1 and Pt 40 R 9 involve the exercise of a discretion. Brambles will argue on the cross claim that cigarette smoke is a dust. The cross-claim does seek indemnity or contribution pursuant to s 5 of the LR (MP) Act on the basis that BAT is a person who if sued by the

plaintiff would have been liable to him. If leave is granted to Brambles under s 25B to relitigate or reargue the issue determined by Maguire J in *Seltzer*, and if cigarette smoke is a dust, Brambles submits that no question of discretion arises. This is because, in that event, the exclusive jurisdiction of the Tribunal under s 11(1) would be invoked.

24. It is unnecessary at this stage to consider whether the cross-claim invokes the exclusive jurisdiction of the Tribunal. Whether cigarette smoke is a dust would, if leave were given under s 25B, be a disputed question of fact.

25. Brambles also submits that if the matter is to be dealt with under s 11(3) or s 11(4), that is under the concurrent jurisdiction, no requirement or permission would authorise the Tribunal to decline to hear a matter regularly before it. It would be only where there was an abuse of process, eg where another court was already seized of the same issues, or where a *forum non conveniens* argument had properly been raised that a question of discretion would arise.

Decision

26. It is true that Brambles gave BAT no notice of the cross-claim until after it had settled its differences with the plaintiff and after he had died. It was open to Brambles to identify the producer of the two **tobacco** brands identified by the plaintiff before he died, but this does not mean it deliberately shut BAT out of the proceedings in order to deny it the opportunity of cross-examining the plaintiff. No condition that BAT be notified of the cross-claim or that it be served within a specified time was imposed by Johns J; neither is it the usual practice of the Tribunal to impose conditions when granting leave to issue cross-claims. Were it the case that BAT had been served before the plaintiff's death it is by no means certain that it would have been given leave to question him, nor is it clear that his health would have justified or permitted such a course. The manner in which the case progressed after the plaintiff's evidence was taken, that is with further interlocutory steps directed, suggests it was brought on with some urgency. The fact that evidence was taken from him at his home indicates his health was poor.

27. The decision of Maguire J in *Stelzer* is favourable to BAT and constitutes a potential advantage to it. It is one advantage BAT would not have in the Supreme Court. There may be evidence admissible under S 25(3). I do not know whether discovery was given or interrogatories answered in *Stelzer*, but suspect they were not. If the cross claim does proceed in the Tribunal and if as a consequence ss 23(1), 25A and 25B afterwards may be invoked there will, irrespective of the outcome of the cross-claim, be advantages to future litigants, actual or potential, advantages which will save time and costs.

28. Were the orders made by Johns J revoked and were proceedings then to be commenced in the Supreme Court it seems in the end that such problems as may confront BAT in the Tribunal would confront it also in the Supreme Court.

29. I am unable to determine upon the material presented to me or the arguments advanced that there is any ground upon which I should exercise my discretion to make the orders sought by BAT's notice of motion. Accordingly, it is dismissed.

30. BAT should pay Brambles costs of and incidental to the notice of motion as agreed or assessed. The costs should include those incurred on the issue of the Tribunal's jurisdiction to hear the cross-claim; that is the issue whether cigarette smoke is a dust, but only until Brambles was informed that BAT no longer sought the cross-claim be struck out for want of jurisdiction and conceded it was an ancillary matter and within the Tribunal jurisdiction.

31. The cross-claim will be listed for directions on 1 October 2002.

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