**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY REGISTRY**



No S313 of 2010

BETWEEN: **DASREEF PTY LIMITED**

Appellant

and

**NAWAF HAWCHAR**

Respondent

**APPELLANT'S SUBMISSIONS IN REPLY**

## PART I: PUBLICATION ON THE INTERNET

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

## PART II: CITATIONS

2. These submissions reply to the respondent's written submissions filed 22 February 2011 ("RS"). The appellants submissions in chief are referred to as "AS". Further these submissions refer to the judgment of New South Wales Dust Diseases Tribunal (Curtis J): *Hawchar v Dasreef Pty Ltd* [2009] NSWDDT 12 ("DDT") and the judgment of New South Wales Court of Appeal: *Dasreef Pty Limited v Hawchar* [2010] NSWCA 154 ("CA").

## PART III: ARGUMENT

*Admissibility of Dr Basden's Opinion*

3. In evaluating the additional references to findings and evidence at RS [9]-[34], the distinctions between different dust fractions must be borne in mind. Any dust cloud will contain a range of particle sizes; however, only particles of 100 µm or less can be breathed in: this is the *inspirable* fraction. Of the inspirable particles, only the smallest particles are capable of actually reaching the lungs: this is the *respirable* fraction. The respirable fraction is defined by a mathematical formula (the "Johannesburg curve") as made up of different percentages of different sized particles, but the maximum size is 10 µm.[1]

4. Generally speaking, particles in the respirable size range are too small to be seen by the human eye. Accordingly, *visible* dust is generally non-respirable and may even be non-inspirable.[2]

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1 Australian Standard 1715 [Ex DX 17], pp 13, 14.

2 Basden T 219.38-41; Australian Standard 1715 [Ex DX17], p 14.

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5. The relevant standard was 0.2 mg/m³ of *respirable* silica dust (on a TWA basis). There is also a standard for "nuisance" dust which is prescribed as 10 mg/m³ of *inspirable* dust of any type (also on a TWA basis).[3] The respondent, however, did not rely upon any alleged contravention of this standard.

6. The respondent sets out at RS [9]-[20] findings made by the trial judge relating to dust created otherwise than with an angle grinder. But the evidence on which these findings were based all came from lay observations of *visible* dust. There was no basis on which these observations could be related to the standard for silica, which was 0.2 mg/m³ of *respirable* dust (even if there had been, there would have been problems of determining how long the dusty conditions persisted, and for how long the respondent might have breathed in such dust, so as to enable a comparison with the standard on a TWA basis).

7. At RS [21] the respondent sets out findings of the trial judge as to Dr Basden's academic qualifications and at RS [26] the respondent quotes Dr Basden's evidence that he had undertaken dust counts in the past. But there is no dispute that Dr Basden had expertise in a general sense; the question is whether the particular opinion in question (that the atmosphere in the respondent's breathing zone, *throughout* the time he was cutting with an angle grinder contained at least 1000 times the standard of 0.2 mg/m³ of *respirable* silica) was shown to be "wholly or substantially based" upon such expertise.

8. RS [25] quotes the primary judge's statement at DDT [74] that Dr Basden claimed to be able from observation alone to form an opinion "within general parameters". This proposition was put into Dr Basden's mouth by the trial judge himself, over objection. What the "general parameters" were was never defined and indeed Dr Basden did not expressly answer in the affirmative.[4]

9. RS [25] refers to the evidence of Dr Basden, quoted at DDT [77], concerning visible dust. But it appears that in referring to this as indicating the level "which should not be exceeded" Dr Basden was referring to a "nuisance dust" threshold of 10 mg/m³ (either for total dust, or inspirable dust, the context does not make it clear), not the *respirable* dust threshold for silica.[5] And it appears that the key statement in Dr Basden's report, referred to at RS [22], likewise referred to total or inspirable dust, rather than respirable dust, in the respondent's breathing zone.[6]

10. RS [24] refers to CA [42], where the Court of Appeal appears to have thought that observations of "visible" dust could be related to a presumed level of (invisible) respirable dust on the basis, attributed to Dr Basden, that "dusts have a consistent fraction of respirable content". Clearly this would require some sort of explanation on a mathematical or experimental basis of how the figure for the respirable fraction could be deduced from a figure for some other

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3 *Occupational Health & Safety Regulation 2001* (NSW), reg 51(2)(d).

4 T 211.22-42.

5 T 211.34; see also T 221.16.

6 See T 222.42-224.48; see also T 227.42-228.2.

fraction of the dust cloud. But Dr Basden did not seek to justify his opinion (or presumed opinion) in that way in his report or in his oral evidence. Nor did the trial judge accept the opinion on such a basis. It appears that the Court of Appeal may have misunderstood what Dr Basden said[7] but whether that is so or not, it was not open to the Court to construct some sort of explanation for the opinion after the event.

11. All of the evidence referred to at RS {24 - 26] must be understood in the light of Dr Basden's concessions that:

(a) he had never actually measured the *respirable* silica produced by any dry-cutting process;[8]

(b) he was not offering an opinion that the respondent's exposure to respirable silica had exceeded any particular numerical value;[9] and

(c) he could not say, merely from the fact that a cloud of dust is visible, how much respirable silica it would contain[10].

12. Even if Dr Basden's thousandfold exceedence was correct, it was a figure which applied only within the dust cloud itself.[11] This was important because while the video in evidence showed that sometimes the stream of dust produced by the angle grinder would double back and envelop the operator, on other occasions it would not. Dr Basden actually assumed that the respondent was cutting in an enclosed "tent" but the primary judge found that this was not the case. If the cutting took place outside the "tent", the figure could be 10, or 100, or even 1000 times less.[12]

13. At RS [27]-[29] the respondent points out that the primary judge reached his conclusion of contravention of the standard by reference to angle grinder exposure only, and that this and some other factors underestimated the actual amount of respirable dust to which the respondent would have been exposed. But as none of these additional sources was quantified (although they would presumably have been less than the angle grinder exposure), they could not bridge the gap if the angle grinder evidence fell short, especially when that evidence might have involved an overestimate by a factor of 10 or more.

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7 Dr Basden's evidence appears at T 201.45-202.17 and T 203.23-49. He appears to have been saying that particles of different substances, having different shapes, are first converted to an "equivalent aerodynamic diameter" (EAD). The lung penetration rate is then determined on the basis of the Johannesburg curve (Ex DX17, p 14), which is assumed to operate uniformly for particles having the same EAD. Dr Basden was *not* saying that the proportion of the respirable fraction in a cloud of dust is the same for all clouds of dust, no matter how the dust is generated and what it contains.

8 T 202.18-19, 203.19-22. See also T 210.8-211.9.

9 T 218.8-11, 218.34-40.

10 T 219.22-35.

11 T 229.12-29.

12 T 232.16-233.9.

14. At RS [30] the respondent refers to the *Jones v Dunkel* inference drawn by the primary judge against Dasreef as a result of its failure to call the occupational hygienist it had qualified, Mr Rogers. This too was unsound. Dasreef's position was that Dr Basden's thousandfold exceedence opinion was so lacking in rational exposition as to be inadmissible. A *Jones v Dunkel* inference could not be used to fill a gap of this sort in the respondent's case. Nor was there any basis for thinking that Mr Rogers' evidence would not assist Dasreef on this point: the issues addressed in his report were not disclosed in the evidence but presumably if the report had assisted the respondent, the respondent would have "served back" the report and relied on it himself.

15. All of this means that the Court of Appeal's decision can only be justified if one takes the view that it was sufficient to show that Dr Basden had expertise in a general sense and that it was up to Dasreef to call an expert witness to show that the opinion was unsound or otherwise persuade the primary judge that it lacked weight. For the reasons given in AS [33]-[39], that should not be accepted.

*"Specialised Tribunal"*

16. In *Enfield*,[13] this Court discussed the circumstances in which weight will be given, on judicial review, to the decision of the tribunal under review on factual issues which may affect its jurisdiction. The weight to be given to the tribunal's opinion depends upon the circumstances, including the degree to which the tribunal is a "specialist" one.[14] There is no reason to doubt that such principles may apply to appellate review of decisions of "specialist" courts as well as judicial review of decisions of administrative tribunals.[15]

17. But that is not the question in the present case. What is in issue here is the view of the Dust Diseases Tribunal that its status as a "specialised tribunal" entitled it to rely upon its own (unspecified) earlier experience to determine an issue in a case before it. The question thus has nothing to do with appellate or other judicial review; it is a question of whether, and if so to what extent, the scope of the judicial notice available to the Tribunal extends beyond that available to an ordinary court.

18. Judicial notice is an exception to the principle that a tribunal exercising judicial functions acts only on the evidence placed before it. That principle is an aspect of natural justice. It follows that neither the principle nor the scope of the judicial notice exception to it operates in a fixed way in all administrative or judicial proceedings. But the key issue is not, as the respondent's argument at [49] and [50] suggests, whether the tribunal deals with a particular class of

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13 *Enfield City v Development Assistance Commission* (2000) 199 CLR 135.

14 *Enfield* at 154-5 [46]-[47]; see also *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 131-2 [14]-[16].

15 Compare *JLT Scaffolding (International) Pty Ltd v Silva* (Court of Appeal, 30 March 1994, unreported, BC9402337), a case referred to by both the primary judge (DDT [87]) and the Court of Appeal (CA [51], [54]), where Kirby P suggested at 12 that the Court of Appeal would be cautious, on appeal from the Compensation Court, about substituting its own view of the facts.

claims. Rather it is the procedure of the tribunal which is laid down, or deduced from, its governing statute.

19. The present case concerns the adjudication of a common law claim by a court which is expressly governed, subject to specific contrary provision, by the rules of evidence.[16] RS [50] and [52] refer to the need for the Tribunal in some cases (not the present) to deal with cases of great urgency because of imminent death, and RS [49] refers to the special statutory provisions to facilitate reuse of previous evidence and findings. But as was argued at AS [48], this only counts against the idea that the Tribunal has some additional, supra-statutory, entitlement to call upon its supposed "specialised knowledge" to resolve issues before it.

20. RS [51] suggests that Dasreef accepts that the "exception in respect of specialised tribunals exists". Clearly not every statutory tribunal is as limited in its entitlement to rely upon material apart from evidence given in the particular proceedings before it as is a court bound by the rules of evidence. But it is not necessary in the present case to decide whether *Tame* was correct in deciding that the former Workers' Compensation Commission could rely upon its earlier experience in determining a question of the capacity of certain working conditions to give rise to the condition of silicosis. Nor is it necessary to decide whether *ICI* was correct in extending this line of authority to the Dust Diseases Tribunal in spite of the statutory differences between the Tribunal and the former Commission. It is sufficient to say that neither decision provides any support to the idea that a specific issue of breach of duty could be decided in such a way in the present case.

21. The respondent also argues that the "specialised knowledge" was supported by actual evidence given in the case. However, the primary judge did not actually rely on that evidence for this purpose. In any event, the proposition that silicosis is "usually" caused by "excessive" exposure to silica faces two fundamental problems in its application to the breach issue in the present case. First, the statement that it is "usually" so caused is an epidemiological generality which cannot automatically be applied to every individual case of the disease.[17] Second, there was no definition of "excessive" exposure in terms which could be related to the standard: indeed the respondent's expert refused to given any numerical definition to what was "excessive".[18]

*Residual Matters*

22. The respondent does not argue that if Dasreef's contentions are upheld, other evidence before the Tribunal was nevertheless capable of sustaining a finding of breach of duty against Dasreef.

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16 See AS [46].

17 *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 135 [62].

18 T 122.8-27.

Dated: 3 March 2011

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