Dust Diseases Tribunal of New South Wales

Turner v Eastwest Airlines Limited [2009] NSWDDT 10 (5 May 2009)

Last Updated: 21 May 2009

NEW SOUTH WALES DUST DISEASES TRIBUNAL

CITATION:
Turner v Eastwest Airlines Limited [2009] NSWDDT 10

PARTIES:
Joanne Maree Turner
Eastwest Airlines Limited

MATTER NUMBER(S):
428 of 2001

CATCHWORDS:
DUST DISEASES TRIBUNAL :- plaintiff an employee of defendant
exposed to smoke from pyrolysed oil in cabin of aircraft
history of oil smells in cabin of aircraft
smoke resulting from fracturing of seal in auxilliary power unit of aircraft
whether proceedings barred by s151D of Workers Compensation Act
whether Tribunal had jurisdiction to hear proceedings
whether plaintiff exposed to dust
whether plaintiff has or had a pathological condition of the lungs
whether plaintiff's condition attributable to dust
whether plaintiff's injury foreseeable
reasonableness of response to foreseeable injury
damages for non-economic loss, economic loss, out-of-pocket expenses, domestic services

LEGISLATION CITED:
Dust Diseases Tribunal Act 1989
Workers Compensation Act 1987
Workers' Compensation (Dust Diseases) Act 1942
Workers Compensation (Miscellaneous Amendments) Act 1994

CASES CITED:
Waverley Council v Ferreira [2005] NSWCA 418
Chapman v Herse [1961] HCA 46; (1961) 106 CLR 112, 120-1
Joanne Turner v Ansett Australia Limited [2007] NSWDDT 26
Van Gervan v Fenton [1992] HCA 54; (1992) 175 CLR 327

TEXTS CITED:
The Macquarie Dictionary
The Concise Oxford Dictionary
Mills Workers Compensation New South Wales

CORAM:
Kearns J

DATES OF HEARING:
16/03/2009, 17/03/2009, 18/03/2009, 19/03/2009, 25/03/2009, 26/03/2009, 27/03/2009, 30/03/2009, 01/04/2009, 07/04/2009

DATE OF JUDGMENT:
5 May 2009

LEGAL REPRESENTATIVES

Mr J McIntyre SC, with Mr D Toomey, instructed by Turner Freeman, appeared for the plaintiff
Mr C S Leahy SC, instructed by Curwoods Lawyers, appeared for the defendant

JUDGMENT:

Abbreviations and descriptions

Abbreviations and descriptions used in these reasons are:

APU	Auxiliary Power Unit. This is located in the tail of the BAe and is used to provide compressed air for ventilation and electrical power on the ground and during the take off and landing phases of the flight. On the ground, it is a primary source, particularly for providing compressed, heated air to air-conditioning packs located in the tail of the aircraft. In those air-conditioned packs, the air is cool and mixed with hot air to provide a conditioned environment in the passenger cabin and

	cockpit of the aircraft. It is not an essential item to the operation of the aircraft.
BA	British Aerospace
BAe	BAe146 aircraft
Borescope	A borescope is an instrument in the form of a long probe with a light, mirror and a magnifying glass at the end of it and is designed to look inside engines for residue of oil and oil leaks.
DDT Act	**Dust Diseases Tribunal Act** 1989
DX	Defendant's exhibit.
Eastwest	Eastwest Airlines Limited, defendant
MEL	Minimum Equipment List. An MEL is a document produced by the manufacturer of an aircraft. It goes before the regulator in the country of manufacture for approval to fly the aircraft with certain defects (T189.27). The evidence did not disclose it, but presumably approval is also obtained in the country where the aircraft flies. When an aircraft flies in these circumstances, the MEL is described as "applying". On several instances leading up to 4 March 1992, an MEL was applied to VH-EWS. It permitted VH-EWS to fly without the APU operating.
MSDS	Material Safety Data Sheet
PX	Plaintiff's exhibit.
PX 12	Exhibit PX 12: 10 pages of a document described as a Discrepancy History Report recording problems with and remedial action in relation to VH-EWS and more fully described in paragraph 107 hereof.
RADS	Reactive Airways Dysfunction Syndrome
SIL	Service Information Leaflet
T	Transcript
URTI	Upper Respiratory Tract Infection
VH-EWS	BAe146 aircraft in which the plaintiff was a passenger on 4 March 1992
WCA	**Workers Compensation Act** 1987

Introduction

1. On 4 March 1992, the plaintiff was employed by the defendant, Eastwest. On that date, she was on a flight between Sydney and Brisbane on a BAe, registered VH-EWS, an aircraft operated by Eastwest. Though she was not on active duty on that flight, there is no issue about the fact that she was in the course of her employment. On descent into Brisbane and for a period of about twenty minutes of the descent, smoke was emitted into the cabin. There was a thick cloud of smoke.

2. The immediate effect of that smoke upon the plaintiff included coughing, a burning throat, sore eyes and headache. So much is not really in dispute. To the extent that these matters are in dispute, I find them as facts.

3. Thereafter, the plaintiff says that she has had persistent cough. The cough has been of a kind she manifested in court during the hearing. I think it is best described as her emitting one or two simple coughs every couple of minutes. Occasionally, it may have been a little more frequent. It was less noticeable on some days than others. She says that she has had periods of paroxysms of coughing which have resulted in her being confined to bed for periods. She has been diagnosed with RADS, though the diagnosis is in dispute. She says also that the RADS was caused by her exposure to the smoke-filled cabin in VH-EWS on 4 March 1992.

4. For her injury, she claims damages in negligence against Eastwest.

5. In some measure, the issues in this case turn on the extent to which I can accept the plaintiff's evidence and I now proceed to review her evidence and the supporting evidence.

The plaintiff's evidence and the husband's evidence

6. I was not impressed with much of the plaintiff's evidence. She resorted frequently to a lack of recall in answering questions. I do not think the lack of recall is satisfactorily explained by the events on which she was questioned being so long ago. She was prepared to answer questions of a distant time in respect of events that were apparently in her favour. I had the impression that she resorted to lack of recall to avoid answering questions, the answers to which were perceived by her to be against her interest. The lack of recall was frequent, but I thought it was best highlighted by her lack of recall of any coughing before the incident of 4 March 1992. Even when confronted with her history of coughing before 4 March 1992 and medical attention and treatment for it, she pleaded lack of recall. I cannot accept that she has no memory of suffering from coughing for many months each year in her late teenage years. It might be 30 years ago, but health is one thing of which people do tend to have a reasonable recall. One might not recall details such as timing, but one could hardly forget a history of coughing for many months each year in late teenage years, especially when that coughing needed medical attention and treatment in the form of tablets and inhalants.

7. Before 4 March 1992, the plaintiff's general practitioner was Dr Malouf. His records were in evidence DX 4D. Some of his handwriting is difficult to read, but I think a fair reading of his notes includes the following:

25 May 1979 – cough for five days with a past history of bronchitis at 13 years of age;

16 October 1979 – cough lasting many months each year;

4 November 1985 – has persisting cough. Settled early in the year with Prednisone;

9 December 1985 – still coughing. Settled a little flaring up again although not as bad as before;

27 December 1985 – still coughing. Prednisone dose ... Becotide ...;

15 April 1986 – ...No further chest trouble. No cough for one month. Stopped Becotide...

In some instances, I have expanded on the doctor's abbreviations. The history would appear to be incomplete in that the entry of 4 November 1985 has the plaintiff's coughs settling early in

the year with Prednisone, but there is no earlier entry where that medication has been prescribed.

I accept the accuracy of these entries.

8. In addition, on 15 June 1993, the plaintiff was able to give Dr Yan a current history of ten weeks of persistent cough with a similar past history in 1986.

9. I do not accept that the plaintiff's lack of recall of prior cough was genuine. I have no confidence in accepting as genuine her recourse to lack of recall generally.

10. There were other unsatisfactory aspects of the plaintiff's evidence.

11. Another unsatisfactory aspect of her evidence, I thought, was her evidence as to whether and when she had made the link or connection between her symptoms and the incident of 4 March 1992. In paragraph 35 of PX 2, she unequivocally made the connection between her symptoms and the incident having, in 1999, read Professor Winder's submission to the Senate inquiry into BAe air quality. When questioned about when she made this connection, she prevaricated and gave evasive evidence, particularly over pages 67 to 69 of the transcript and I sought to clarify the matter at pages 86 and 87.

12. The plaintiff said that she did not see a doctor for 15 months after the incident of 4 March 1992 because she did not think that her condition was related to the incident. There are two unsatisfactory aspects to this answer. The first is that I think it is almost inconceivable that the plaintiff could not have related the two matters. The other and more significant matter is that whether or not the plaintiff had related the two matters ought have nothing to do with the need to consult a doctor. It is not the idea of a connection between symptoms and an event that causes one to go to a doctor, it is the fact of illness.

13. Further, it is difficult to understand that she could be presenting herself as a person in good health up until 4 March 1992 and with continuing symptoms thereafter and not in her own mind, whether it be right or wrong, make a connection between one and the other. Further, in paragraph 20 of PX 2, she deposes to writing a letter to Janine Stewart (manager of flight attendants) a few days after 4 March 1992 outlining her symptoms following the incident and they were symptoms she reckoned were related to the incident T86.47 – 87.01 and 87.10. She then took the position that she was not maintaining that her symptoms were related to the incident because once she left work the symptoms went. This reference to leaving work was a reference to leaving work on maternity leave on 27 March 1992. She was on maternity leave until January 1993. Ultimately, she could not offer any evidence as to whether she had any cough on maternity leave T87.34.

14. Another unsatisfactory aspect of her evidence related to time she took off work between March 1992 and 2002 because of her cough PX2, paragraphs 28 and 32. She applied for sick leave only on days when she was rostered on T21.35. In 2002, her employment ended when Ansett Airlines, for whom she was then working, collapsed. The plaintiff indicated that there would not have been any difficulty about her taking time off work for reasons of sickness and that she did so at times and produced medical certificates as required T46.49.

15. The plaintiff's sick leave record is contained in PX 42. It reveals as follows:

1993 - one day's sick leave, not related to the illness the subject of these proceedings;

1994 - 19 days' sick leave, including two days for URTI;

1995 - 20 days' sick leave, including one for URTI and sinus, three for virus and one for URTI;

1996 - nil sick leave. The plaintiff was on maternity leave;

1997 - eight days' sick leave, including one for cough and upper respiratory acute infection and one for URTI;

1998 - nine days' sick leave, including 4 for laryngitis, two for URTI, vomiting and one for URTI;

1999 - 10 days' sick leave, including one for URTI;

2000 - nine days' sick leave, including six for URTI and two for laryngitis;

2001 - six days' sick leave, including one for bronchitis and two for URTI.

16. I have listed all the sick leave taken by the plaintiff. I have also itemised all days that might possibly be related to cough. There is one day only (10 July 1997) when cough was included as a reason for taking sick leave. I would expect that with many of the other days, where I have referred to illnesses, that cough would have been associated with those illnesses. The plaintiff's case, however, is that she was required to take time off sick because of the chronic cough she developed as a result of the exposure to the smoke on 4 March 1992. This record does not support that claim. There is no instance of her taking a day's sick leave by reason of that cough. I do not accept her evidence that she took time off work in that period by reason of chronic cough.

17. Another unsatisfactory aspect of the plaintiff's evidence was her evidence as to the extent to which she suffered severe coughing episodes. In paragraph 54 of PX 2, she stated that she had not gone for more than three months without a severe coughing fit. On such occasions she coughs constantly for up to six weeks and, for a few days, her cough is so severe she cannot do anything and is forced to lie in bed. Evidence to the same effect is given in paragraphs 73 and 75 of PX 2. This evidence is not corroborated by contemporaneous records or by the husband's evidence.

18. The matters I have mentioned cause me difficulty in accepting much of the plaintiff's evidence.

19. This makes it difficult trying to ascertain the extent of the plaintiff's symptoms following the incident of 4 March 1992. Her evidence is so unreliable that it is necessary to turn to contemporaneous records or other plausible evidence to ascertain her true symptoms over time.

20. Having made the observations I have of the plaintiff's evidence, I turn to her evidence. To the extent that I set out her evidence without comment, it may be taken that I accept it. Her

evidence, in chief, was predominantly contained in her affidavit PX 2.

21. The plaintiff left school at 16 years of age. She then worked with the Rural Bank in the city between 1978 and 1981. Then, she commenced with Eastwest as a flight attendant for several years working on Friendship aircraft. In 1990, she commenced working on BAe. From the time she commenced to work on those aircraft, she noticed an unpleasant and irritating smell and it was present on all BAe she flew on. She spoke to Janine Stewart about the smell. Sometimes, she reported it to the captain at the flight deck.

22. Before 4 March 1992, during or after flying on BAe, the only symptoms she experienced were headaches and a sore throat. On 4 March 1992, in the course of her employment, she was a seated passenger on a flight on a BAe registered VH-EWS from Sydney to Brisbane. She was travelling with two other crew members seated next to her being Peter Smith and Rob Donovich.

23. When the aircraft commenced its descent into Brisbane, Peter started to cough, then Rob did, then the plaintiff did. She looked around and saw a cloud of white grey smoke entering the cabin through the wall vents for the air conditioning. The cabin became filled with thick, dense smoke and the plaintiff could not see more than several feet in front of her. She was unable to stop coughing. Her throat was burning. Her eyes became sore and started to water and she developed a headache. When she got off the plane, she went to the bathroom and washed her face and eyes. Other passengers from the plane were doing likewise. She gargled some water, washed her face and felt slightly better.

24. The plaintiff worked over the next three days.

25. She then says that her headache continued for days as did the burning sensation in her eyes and her sore throat and her cough did not go away. She also says that she developed welts and blisters on her skin. I accept her evidence about symptoms in relation to the skin, but I do not accept that she had continuing headaches for days or continuing burning sensation in her eyes or sore throat. Her husband did not notice anything unusual about her when she returned home a couple of days later T95.29.

26. On 4 March 1992, the plaintiff was 25 weeks into her first pregnancy. She says she was concerned whether her unborn child would have been affected by the incident of 4 March 1992. She kept flying on the BAe until she took maternity leave on 27 March 1992. During that time, she was doing her full normal shifts and her full normal duties. She says that she continued to cough. I do accept that she did cough, but that it would best be described as occurring every couple of minutes without being intrusive or distracting.

27. At this point, I pause to note that Mr Leahy SC, who appeared for the defendant, submitted that I should not accept the plaintiff's evidence as to this coughing and other matters as her evidence was unreliable and not supported by evidence from fellow workers, friends or relatives, except the husband. I have indicated my view as to the reliability of the plaintiff's evidence. I shall deal with the husband's evidence later, but essentially, I accept it. That being so, to the extent that his evidence corroborates the plaintiff's evidence, the absence of evidence from fellow workers, friends or other relatives is not necessary. There are areas, however, where the husband's evidence does not corroborate the plaintiff's evidence and in these areas I do not accept the plaintiff's evidence.

28. During her maternity leave, her daughter was born on 21 June 1992. The plaintiff returned to work from maternity leave on 29 January 1993. During maternity leave, she continued to suffer from "irritation problems including a cough" PX2, para 25.

29. When she returned to work on 29 January 1993, the plaintiff resumed flying. Until September 1993, she flew mostly on BAe and occasionally on 727 aircraft. After September 1993, the plaintiff flew on the BAe aircraft "on an intermittent basis" PX 2, paragraph 27.

30. The plaintiff claimed she had time off work as a result of her cough which had become worse and more pronounced when she resumed flying on the BAe. I do not accept this evidence of the plaintiff for reasons given in paragraphs 14 to 16.

31. During 1993, she saw her general practitioner, Dr McConnell. Dr McConnell referred her to Dr Yan, a respiratory physician.

32. Dr Yan told the plaintiff that she had become highly allergic and diagnosed allergic rhinitis with a postnasal drip. Dr Yan prescribed nasal steroid sprays which did not help and the cough persisted. The plaintiff continued to see her general practitioner about her cough and again in 1994 Dr McConnell referred her to Dr Yan.

33. In late 1995 the plaintiff became pregnant and ceased flying in or around December 1995. She left work soon after that time. Her baby was born on 17 June 1996. She resumed work on a full time basis in March 1997, working on domestic and international flights. The plaintiff flew on BAe intermittently until 2001. Most of her work was on day time, domestic, "short hops" routes carried on BAe.

34. Again, the plaintiff claims to have continued to have time off work because of her "chronic cough" PX 2, paragraph 32. I do not accept that evidence. Her cough became "much more severe" if she had a cold and at times the cough interrupted her talking. I do accept that her cough would be worse when she suffered colds, flus, URTIs and the like and that the cough could interrupt her talking, although that was not evident in her giving evidence.

35. In July 1998, the plaintiff saw Dr Harrison, an ear, nose and throat specialist, about her cough. Dr Harrison told the plaintiff that she was not suffering from allergic rhinitis with a postnasal drip, but rather a deviated septum. He prescribed Aqueous Aldeon and the plaintiff returned to him on 3 August 1998 and told him that that medication did not work. Dr Harrison investigated whether the plaintiff had reflux and prescribed Losec which had no effect on the plaintiff's cough. Dr Harrison was unable to find a reason for the plaintiff's cough.

36. In late 1999, the plaintiff started seeing another general practitioner, Dr Mahmood. She complained about her cough. Dr Mahmood prescribed Friar's Balsam as an inhalant which had no effect.

37. In 1999, the plaintiff read a submission made by Professor Winder to the Senate inquiry into BAe air quality. The plaintiff says she then connected her cough and respiratory problems with the incident of 4 March 1992 PX 2, paragraph 35. For reasons given earlier, I find her evidence about when she made the connection to be unreliable.

38. In late 1999, the plaintiff was referred to Dr Phoon. She told Dr Phoon of the incident and the problems she was experiencing.

39. In February 2001, Dr Mahmood referred the plaintiff to Professor Glanville. Professor Glanville diagnosed RADS. The plaintiff saw Professor Glanville throughout 2001 and 2002. He prescribed "puffer" medication.

40. The plaintiff says she took time off work to ascertain whether the cough would recede if she was away from her workplace. She took Professor Glanville's medication as prescribed. She felt good some weeks. The cough would return with no obvious precipitating cause. She described the cough as being "much the same as when I was at work" PX 2, paragraph 42. As the cough did not improve whilst on leave, the plaintiff returned to normal duties at work and the cough continued. She told Professor Glanville that the cough did not go away.

41. Dr Mahmood referred the plaintiff to Dr Burdon, a respiratory physician, on 14 August 2002. The plaintiff had learned that Dr Burdon had examined some Ansett crew in relation to respiratory problems and she requested the referral. Dr Burdon did not prescribe any new treatment for the plaintiff.

42. On 13 May 2004, the plaintiff underwent a gastroscopy and colonoscopy performed by Dr Hall.

43. In March 2002, the plaintiff was feeling well and not coughing. She stopped taking her medication. By June of that year, she "again had a chronic cough such that I could not talk because of my cough". She resumed taking medication. After a few months the cough subsided. To the extent that the plaintiff seeks to convey that she could not talk over a period of a few months because of her cough, I reject that. I accept that at times she has worsened episodes that interfere with her ability to talk. She again stopped taking the medication. The plaintiff developed a severe cough and required oral Prednisone. She describes that this pattern has continued. The plaintiff says she knows she has to take puffer medication as prescribed by Professor Glanville "for the rest of my life" PX 2, paragraph 52.

44. The plaintiff continues to experience "acute episodes which cause coughing fits" PX 2, paragraph 53. She experiences respiratory infections and is affected if she is run down and tired. Exposure to smoke or fumes or cold air conditioning causes an instant reaction.

45. Since March 1992, the plaintiff has experienced coughing fits about four times a year. She has not gone more than three months without a severe coughing fit PX 2, paragraphs 54 and 73. When this happens, she coughs constantly for a period of up to six weeks. During such episodes, she coughs severely for a few days and she "cannot do anything" PX 2, paragraph 54 and she lies in bed, trying to be still and quieten down. I do not accept the plaintiff's evidence that she cannot do anything or that she lies in bed because of the cough. Nor do I accept the coughing fits last for up to six weeks.

46. The plaintiff is unable to talk without coughing. She has difficulty sleeping because of the cough. She feels as though she is gagging or choking and the cough burns her throat. The coughing causes a tight feeling in her chest and she experiences pain in her chest muscles. She feels fatigued. Within a few days, she loses bladder control. The plaintiff cannot predict when a coughing fit will come on PX 2, paragraph 73.

47. The plaintiff takes Codeine and Prednilsone. After a few days the medications open her airways and relieve "the feeling of someone jumping" on her chest and she brings up small amounts of mucous PX 2, paragraph 54.

48. On a few occasions when the plaintiff has experienced severe coughing fits, she has seen a doctor at her local medical centre. No evidence was tendered from any such doctor. I do not accept that the coughing fits have the consequences claimed by the plaintiff in paragraph 44 or that she has the symptoms to the extent alleged in paragraph 45.

49. In 2008, when the plaintiff had a severe cough, a doctor increased her dose of Symbicort to 400mg, up to 16 times a day. She says she also sees doctors in Sydney three or four times a year for prescriptions for her puffer medication. No evidence was tendered from any such doctor. Dr Papakostas was one doctor she saw from 2002 to 2004. She could not recall how often she saw him. It may have been a few times over two years T58.19.

50. The plaintiff says that up until the incident of 4 March 1992, she did not have any health problems and she never smoked. Prior to March 1992, the plaintiff had led an active life, playing competitive and social sport. She continues to play sport, but not at the same level. Swimming in chlorinated water and running causes her to cough.

51. The plaintiff worked for Ansett up to 4 March 2002. She worked on a rotating basis. During that time, the plaintiff applied for a position as a flight service director with Impulse Airlines. The application was unsuccessful because the airline "went under" PX 2, paragraph 60. Later, the plaintiff completed the first stage of a recruitment process with Virgin Blue, but did not continue because she "was over the age of 26 years" PX 2, paragraph 61.

52. In November 2001, the plaintiff worked for an orthodontist for a week. She left because of the unsuitability of the hours she was required to work and because she "coughed continually" and was "uncomfortable coughing in the vicinity of patients" PX 2, paragraph 62. I do not accept that she was unable to do the work because of the cough.

53. Due to the shortage of airline jobs, the plaintiff decided to join the police force. She completed the initial stages of recruitment and completed a Transition to Policing Studies course via Charles Sturt University. The plaintiff undertook medical tests as required by the police force. Those tests included hearing and eyesight tests. One of them was on 29 April 2002. The other presumably was thereabouts. She also needed a medical certificate from her general practitioner. For this she says she saw Dr Papakostas. She cannot recall what happened to the form of medical certificate that he was meant to complete T24.03. She says that Dr Papakostas told her that she was not fit for this job. There is no evidence from Dr Papakostas to that effect and I do not accept that that was his opinion. There is contrary evidence from Professor Glanville PX 6B and the plaintiff acknowledged that Dr Glanville supported her with her intention to pursue the police work. In PX 6B, Professor Glanville wrote "TO WHOM IT MAY CONCERN". The context of the document suggests that it was a report in support of the plaintiff's application to undertake the police work. I do not accept the plaintiff's evidence that Dr Papakostas told her she was unfit to undertake the work and for that reason she did not pursue the application. There was no explanation offered for the absence of Dr Papakostas and, in light of the suggestions put to the plaintiff in cross-examination on this matter and also the opinion of Professor Glanville at the time that she was

fit without restrictions, I can more comfortably come to the view that the evidence of Dr Papakostas would not have assisted the plaintiff on this point. Further, the plaintiff was proceeding with the application no doubt thinking she could do the work. If she had have been accepted into the police force, she says she would have tried to work doing sky marshalling PX 2, paragraph 66 or general duties T90.37. She would have worked to the compulsory retirement age.

54. For a period of nine weeks from October 2002 to January 2003, the plaintiff worked as casual ground crew on an "Aero care" F28 jet. She worked eight hours a week in two four hour shifts. She was in an aircraft cabin on the tarmac when air was coming out of the vents and she smelt oil. She says this concerned her.

55. The plaintiff and her family moved to the North Coast late in 2002 and early 2003. Her husband had applied for a job as the headmaster of a new school that was just established there. The plaintiff's condition and the desire to live in a clean air environment in the country were factors taken into consideration when her husband applied for the job. A significant reason for the move was the husband's opportunity to take on the position of headmaster at a school, a role he had not held before. A further incentive for him to take that on was that the school was a new school that was being established.

56. The plaintiff says that if she did not have her coughing condition she would have continued to work in the airline industry as she had already done for 20 years. She did not plan for retirement at a particular age and was aware of the retirement age of 55+ years. She would have looked for work with domestic and international airlines and was prepared to be away overnight. If she was unable to find work in the airline industry, she would have looked for work in the hospitality industry. She had worked briefly in a bar/restaurant in 1989. Since living on the North Coast, the plaintiff has applied for two part time customer service jobs. Her applications were unsuccessful.

57. The plaintiff believes her cough stops her from working because she could not cope if she had an acute episode of coughing. When she experiences an acute episode, the plaintiff says she has trouble talking for weeks. She finds the coughing exhausting and says she spends a few days in bed. I do not accept this evidence.

58. The plaintiff says that before her cough, she had no plans to give up work. She has worked since she was 14 years old. She does not like not working. She wanted to be a working mother as a role model for her children.

59. The plaintiff says that when she experiences acute episodes of coughing, she needs care and assistance looking after herself and the household. Whenever she experiences coughing fits, she takes to her bed for approximately 3 days. I do not accept that evidence. During these times, her husband takes over the running of the house and the plaintiff is unable to carry out any work around the home. I do not accept that the plaintiff is unable to carry out any work around the home at these times and I do not accept that the husband takes over the running of the house because the plaintiff is unable to do so because of the cough. Further, much of what the husband does is unrelated to the cough. It is said that the plaintiff's husband spends about six hours a day doing the "cooking, cleaning, washing and everything else to keep the household going" PX 2, paragraph 75. After the period of being bed ridden and within the six week period of the coughing fits, the plaintiff's husband provides care and assistance to her

and the household for approximately four hours a week. I do not accept that such care and assistance to the extent claimed is provided by reason of the plaintiff's cough.

60. As the plaintiff cannot tolerate chemicals and fumes, her husband attends to chores such as cleaning the shower recess and oven using chemical sprays. He spends about one hour per week doing this work. The husband's evidence on this was not so clear. Mr Leahy SC submitted that the husband's evidence contradicted that of the plaintiff on this point. He said he had been doing this work since 1993 "most of the time" T98.48. At other times he said the plaintiff does it T99.49, but to a different level. He has never noticed her start to cough when she has used chemical cleaning agents T99.24. The husband's evidence is not as clear as it might have been, but I do not think it contradicts the plaintiff's evidence. I think in substance it supports the plaintiff's evidence.

61. The plaintiff is embarrassed by her cough and the attention it brings from other people who express concern. She says it has restricted her social and recreational activities. She avoids going to the theatre or concerts as she is unable to suppress the coughing for the duration of a performance. She was recently unable to tolerate burning incense at a church function. The plaintiff was unable to take up a spot on a radio station because of her coughing.

62. The plaintiff used to avoid clubs or hotels because of the smoke. Since the anti-smoking laws, she can now re-enter these environments T22.14. She is also affected by bushfire smoke or smoke from log fires. The plaintiff starts to panic if she feels she has been exposed to chemicals. She cannot walk past stored paint.

63. The plaintiff plans everything she does and carries her puffers on her at all times.

64. The plaintiff is angry at her condition.

65. The plaintiff's first recorded complaint of cough was to Dr Yan on 15 June 1993 when she gave a history of cough persisting for 10 weeks. There are then gaps in recorded history until she saw Dr Phoon in 1999. As to the plaintiff's real history of coughing, I obtain most assistance from her husband's evidence.

66. It was put to the husband that he was prepared to exaggerate his evidence for the purpose of assisting the plaintiff's case. I do not accept that challenge to his evidence. I thought he gave his evidence honestly and to the best of his ability. I am mindful that in some instances, he was giving evidence of events long ago and his memory may not be clear or correct on some matters. He acknowledged as much.

67. The husband gave evidence that the plaintiff did cough during her maternity leave from March 1992 to January 1993, both before and after the birth of the first child and also when she returned to work from maternity leave T96. The plaintiff's evidence on this was unreliable. It was confusing, ultimately resting with her not being able to recall if she coughed during maternity leave T87.34. Her husband thought that her cough during this period was much the same as it is now T100.18. I accept that the plaintiff has had what might be called an underlying cough from about the time of the incident to the present, although there may have been some short periods when she was cough free. To the extent that histories to doctors suggest otherwise, I do not accept those histories. The cough I accept that she has had is an underlying cough which is emitted every couple of minutes. I do not find it to be a loud or

intrusive or distracting cough. It was certainly not demonstrated to be so during the running of this case. It might well be different if she were in a cinema or at a symphony concert where it would no doubt be most distracting and, undoubtedly, embarrassing for her. There is also a more aggressive cough which the plaintiff has occasionally and I accept that this is so. However, I do not accept it is as the plaintiff describes and I accept her husband's evidence on this point.

68. The husband's evidence was that the coughing now is as it has been since 1992 T100.18. At times, there were episodes of coughing he described as more aggressive. On those occasions, the plaintiff would appear to lose her breath and these events could last a couple of days more or less T96.29-34, up to one week T99.30, and occurred about six times a year T96.36. Sometimes, she may have been in bed if she was tired T96.46. Mr McIntyre SC, who appeared with Mr Toomey for the plaintiff, submitted that this evidence corroborated the plaintiff's evidence of the plaintiff taking to her bed when she had the more severe episodes of coughing. I do not accept that. This evidence needs to be read in conjunction with the cross-examination, especially at T102-3. There, the husband could not recall occasions in given years of the plaintiff taking to her bed. When the general question was put to him, he refuted the suggestion of having no memory of this between 1992 and today and was able to recall two or three specific instances. They were the only instances he could recall and they were distant in time.

69. In my view, the plaintiff's evidence about the worsened episodes lasting about six weeks and taking to her bed is not corroborated and I do not accept it.

70. The husband stated the plaintiff's cough continued until she moved to the North Coast in early 2003. Following that, the persistent cough continued, but the more aggressive episodes diminished. To what extent they diminished is not clear, but it seems that relief must have been temporary as the husband gave evidence of the plaintiff still suffering the more severe episodes.

71. The plaintiff's husband has known her closely since 1977. I accept his evidence that before March 1992 she was vibrant, cheerful, friendly, active and enjoyed life and that now her vibrancy, vitality and energy levels are less. From 1977 to 1992, he had not noticed anything adverse about the plaintiff's health. In view of the plaintiff's history of coughing before 4 March 1992, I think this is an instance where his memory has probably let him down. He did acknowledge that that could be so and that the plaintiff could have visited doctors for a cough before 1992.

72. I find that following the incident of 4 March 1992, the plaintiff suffered the acute symptoms described in paragraph 2 hereof. Following that incident, she developed an ongoing cough. The cough has been of two kinds. There have been what I might call an underlying cough and a more aggressive one. The underlying cough might be described as a nuisance or an irritant. I am unable to find with any specificity what its frequency was when it commenced. I can find only that it was less frequent than it is at present. This difference in frequency, however, is not material to my deliberations. The present frequency is once every couple of minutes. It is not a loud cough or intrusive or distracting. The more aggressive cough resulted in the plaintiff's appearing to lose her breath. This occurred following the incident of 4 March 1992 and lasted until she moved to the North Coast in early 2003. These episodes occurred about six times a year and lasted about two to three days, although they could be shorter or

longer. For a period of time I cannot determine, there was some improvement in the plaintiff's condition so far as the more aggressive cough was concerned after she moved to the North Coast. I do not accept that the more aggressive episodes have lasted six weeks or have required the plaintiff to take to her bed.

Jurisdiction

73. The first question that arises in this case is whether this Tribunal has jurisdiction to hear these proceedings.

74. Section 10(1) of the DDT Act provides:

"The Tribunal has, except as provided by sections 29 and 32, exclusive jurisdiction to hear and determine proceedings referred to in sections 11 and 12."

75. Section 11(1) of the DDT Act provides:

"If:

(a) a person is suffering, or has suffered, from a dust-related condition or a person who has died was, immediately before death, suffering from a dust-related condition, and

(b) it is alleged that the dust-related condition was attributable or partly attributable to a breach of a duty owed to the person by another person, and

(c) the person who is or was suffering from the dust-related condition or a person claiming through that person would, but for this Act, have been entitled to bring an action for the recovery of damages in respect of that dust-related condition or death,
proceedings for damages in respect of that dust-related condition or death may be brought before the Tribunal and may not be brought or entertained before any other court or tribunal."

76. Section 12 is not relevant.

77. The issue here is whether s11(1)(a) is satisfied, that is, whether the plaintiff is suffering or has suffered from a dust-related condition. The answer to that issue lies in s3 which defines "dust-related condition" as:

"(a) a disease specified in Schedule 1, or

(b) any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust".

The plaintiff does not fall within (a) so the question is whether she falls within (b).

78. Three questions arise here.

(1) Does the plaintiff have or has she had a pathological condition of the lungs? For reasons which I explain later, I consider that the answer to this question is yes.

(2) Was she exposed to dust? This is the main jurisdictional question on which the debate was

centred and I shall return to that.

(3) If the answer to the above two questions is 'yes', is the plaintiff's condition attributable to the dust to which she was exposed? That is a causation question and I deal with it in considering the plaintiff's condition and its causation. For reasons there expressed, my view is that her condition was caused by exposure to the dust to which she was exposed.

79. Returning to (2), was the plaintiff exposed to dust? The Macquarie Dictionary has a number of definitions of dust. The first three have relevance. They are as follows:

"**1.** earth or other matter in fine, dry particles.
2. any finely powdered substance, as sawdust.
3. a cloud of finely powdered earth or other matter in the air."

The first definition of dust in The Concise Oxford Dictionary is as follows:

"1 a finely powdered earth, dirt, etc., lying on the ground or on surfaces, and blown about by the wind. **b** fine powder of any material (*pollen dust; gold-dust*). **c** a cloud of dust."

80. The evidence as to what substance the plaintiff was exposed to comes essentially from the observations of the plaintiff and the evidence of Dr Crank and Dr Markovic, experts qualified on behalf of the plaintiff and the defendant respectively.

81. So far as the plaintiff's evidence is concerned, I accept her observations as to what she saw in the cabin on 4 March 1992. I find that on 4 March 1992, there was emitted into the cabin of VH-EWS a cloud of white grey smoke. It came in through the wall vents. The cabin became filled with thick, dense smoke reducing visibility for a time to not more than four feet. The smoke continued to pour through the vents for a period of about 20 minutes as the plane descended into Brisbane. It was still present in the aircraft at the time the plaintiff left the aircraft. The smoke was emitted into the cabin as a result of the oil in the APU undergoing a process of pyrolysis.

82. Dr Crank and Dr Markovic provided reports PX 4, DX 5A, DX 5B and gave evidence. There was a point of dispute in their evidence that I could not understand. That point was whether pyrolysis could occur below the boiling point of oil. I would have thought that there could be no disagreement about that point. The result was that both Dr Crank and Dr Markovic returned to give evidence in a joint session. The upshot of that was that there was much agreement. They agreed that pyrolysis is the thermal decomposition of organic material in oil without combustion. They agreed it occurs before the boiling point or the flash point of oil. The flashpoint of Mobil Jet Oil II needs to be taken from the MSDS. There are two: 246C and 270C. Pyrolysis occurs at close to 230C. Breakdown of oil that occurs before smoke is emitted is not likely to be hazardous. After smoke occurs, the materials are likely to be hazardous to eyes, mucous membranes and lungs. If one could look through a microscope or other aid, what one would see in the smoke is small particles, ultra-small particles of carbon.

83. In view of the consensus in the evidence of Dr Crank and Dr Markovic, it is not necessary to cover much of the evidence they gave in their reports or orally. Dr Crank stated that the small particles remain suspended in the air for a time and eventually settle on a surface and look like a black, sooty, dark mess T120.30. The suspended particles may have moisture in

them. The smoke in the cabin of the aircraft on 4 March 1992 would have contained pyrolysis products and pyrolysis products only.

84. Mr Leahy SC submitted that smoke is not dust within the meaning of the DDT Act. The distinction is that dust is the result of something being broken down either deliberately or inadvertently. Smoke is not a product of something being broken down. It is a product of combustion. In my view, whilst dust may be produced by something being broken down, it is not the only way in which dust may be brought about. The dictionary definitions would not compel that result and nor would the use of the word in the context of the Act. Schedule 1 of the DDT Act lists a number of diseases. Some of them may be caused by a product that is not broken down, for example, Farmer's Lung and bagassosis. They are diseases that the Act contemplates being caused by an agent, not necessarily broken down in the way submitted by Mr Leahy SC. That agent is recognised by the Act as a dust. That being so, an agent for the causation of a disease may be a dust within the meaning of the Act contrary to this submission of Mr Leahy SC.

85. Mr Leahy SC also submits that under s35 no diseases have been added to Schedule 1. That is a neutral point. He also submits that s25(3) supports a narrow construction of dust. I do not think that is so. I do not think s25(3) offers assistance as to what the meaning of dust is. It is a section that operates where proceedings have, in fact, been concerned with dust exposure and dust diseases.

86. Mr Leahy SC's more telling submission, I think, is that if the Act were meant to cover smoke, it would have been a simple thing to include it and he gets support for that submission from the fact that none of the scheduled diseases is a disease caused by smoke. This argument has some force especially when it is well understood and must have been known to Parliament when the Act was passed that there are many smoke-caused diseases, lung cancer from smoking perhaps being the most obvious. I do not think this submission should be upheld. In my view, the wording of the relevant sections of the Act encompasses smoke as a dust. In s3, a dust-related condition is relevantly any pathological condition of the lungs attributable to dust. In ordinary common parlance, dust encompasses smoke or ash. Dust may need to be distinguished from gas, fume or vapour. The distinction would be that dust comprises particulate matter. Smoke comprises particulate matter and, accordingly, is more comfortably described as dust rather than gas, fume or vapour. I do not consider that there is a distinction between smoke and dust such that smoke cannot be dust. When the particulate matter settled, it would, to most people, be recognised as dust. If, through the microscope or other aid, one could see the particulate matter without the smoky haze, most people would recognise the particulate matter as dust. The dictionary definitions would encompass smoke as dust.

87. There was some evidence and there were some submissions about whether a dust needed to be dry to fall within the DDT Act. In my view, this is not essential. Dryness is not a component of some of the dictionary definitions of dust I have referred to earlier.

88. Further, reference to some of the dust diseases in Schedule 1 of the DDT Act and to some of the dusts that may cause those diseases would suggest that dust does not need to be dry. Bagassosis and Farmer's Lung are diseases that may be caused by products that are not dry. Both are caused by spores from fungi. Furthermore, Mills Workers Compensation New South Wales practice 80202.2 states that wood dust can cause occupational asthma, although the case cited *Stelzer v W D & H O Wills (Australia) Limited,* Dust Diseases Tribunal, 24 February

1995 did not give rise to the specific question. Wood dust is not necessarily dry. The practice also states 80202.3 that pigeon droppings may properly be described as dust although no reference is cited for that. These matters suggest that dryness is not an essential component of dust to come within the DDT Act.

89. I must, with reluctance, come to a different view to that expressed by Maguire J in *Stelzer* where he held that to come within the DDT Act dust must be dry. He thought that the Macquarie Dictionary definitions suggested that dryness was a necessary element for dust. I do not think that is so, for example, "sawdust", referred to in the definitions, need not be dry. Further, his Honour does not appear to have been taken to the scheduled diseases where it is apparent that some diseases may be caused by an agent that is not dry.

90. I do not find the evidence given as to the meaning of the term "dust" to be helpful. Indeed, I do not think it is relevant. The term is not a scientific or technical term. It is an ordinary, common English word and it takes its meaning from the text and context in which it appears in the DDT Act. Evidence from experts that terms such as dust, fume, vapour, mist, gas and smoke have certain meanings is not relevant and I do not consider such evidence in coming to a view about what "dust" means in the DDT Act. What is useful, however, is that the experts describe material that is suspended in the air as aerosol. It may be solid or liquid. It is clear that the smoke in the cabin of the aircraft on 4 March 1992 was an aerosol that contained solid matter.

91. For reasons I have expressed, I consider the plaintiff was exposed to dust within the meaning of the DDT Act. The result is she has a dust-related condition, such that jurisdiction is founded in the Tribunal to hear and determine these proceedings.

Limitation

92. In the course of evidence, an issue arose as to whether the plaintiff's claim was barred by reason of s151D of the WCA.

93. Section 151D(2) provides:

"A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken."

94. I do not think this provision applies and that is because of s12A of the DDT Act. Section 12A(2) provides:

"Nothing in the *Limitation Act 1969* or any other statute of limitations operates to prevent the bringing or maintenance of proceedings before the Tribunal in relation to dust-related conditions."

95. I have determined that the plaintiff suffers a dust-related condition within the meaning of the DDT Act and, accordingly, her proceedings are "proceedings before the Tribunal in relation to [a] dust-related" condition. As the plaintiff's proceedings are in relation to a dust-related condition, s12A(2) applies. In my view, s151D of the WCA is encapsulated by the

phrase "any other statute of limitations" and, accordingly, it does not bar the plaintiff's proceedings.

Breach of duty of care

What happened?
96. On 4 March 1992, approximately 1.75 litres T294.16 of pyrolysed oil entered the cabin of VH-EWS. The oil escaped from the APU and was heated causing it to undergo pyrolysis. It came through the bleed lines into the cabin. There is no dispute that the oil escaped because of a cracked compressor carbon seal PX 13.

Was it foreseeable?
97. The plaintiff's case is that the crack in the compressor seal was foreseeable with the result that it was foreseeable that oil would leak, pyrolyse and the smoke from that process enter the cabin of the aircraft. The defendant's case is that the crack in the seal was totally unpredictable, that it happened suddenly when forces in a hostile environment were applied to the APU on descent of the flight into Brisbane. The opposing positions of the parties do not pose the right question *Waverley Council v Ferreira* [2005] NSWCA 418 [42], [43], *Chapman v Herse* [1961] HCA 46; (1961) 106 CLR 112, 120-1. The question is whether it was foreseeable that smoke from leaking oil would enter the cabin of the aircraft. This was foreseeable. In any event, I think the crack in the seal or failure of the seal was foreseeable.

98. In considering foreseeability, the following matters are of relevance:

(a) leakage of oil from the APU;

(b) the existence of cabin smells;

(c) the defendant's attempts to find the source of the cabin smells;

(d) advice received by the defendant as to the source of the cabin smells.

Oil leakage from the APU
99. Mr Cain, who is a licensed aircraft engineer and who worked for Ansett Airlines from 1964 to 2001 and was qualified by the defendant to give evidence, said some oil leakage from the APU is permissible. Laboratory tests allow the loss of three millilitres per hour of operation of the APU. Mr Marosszéky, who had experience in aircraft maintenance engineering and other qualifications and was qualified by the plaintiff to give evidence, was of a contrary view PX 11A, p3 and T206.31. I prefer Mr Marosszéky's view. Mr Cain's opinion became an understanding T296.36 and was based on some manual which commented on the laboratory tests T303.9. The manual was not put into evidence. Further, Mr Marosszéky's view gains support from PX 39. PX 39 includes:

"... WE HAVE CONCENTRATED THE MAJORITY OF OUR EFFORTS ON PREVENTING REINGESTION OF CONTAMINATED AIR INTO THE APU AND OF INSURING [sic] THAT THE APU COMPRESSOR SEAL PREVENTS OIL LEAKAGE INTO THE BLEED AIR SYSTEM";

"GARRETT AND BRITISH AEROSPACE DISAGREE WITH ANSETT'S SUGGESTIONS

THAT A CARBON SEAL WILL ALWAYS LEAK A SMALL AMOUNT".

100. It was submitted that I should prefer Mr Cain's evidence to that of Mr Marosszéky. One reason was that Mr Marosszéky was partial, especially in the way he cast doubt on PX 12. One aspect in which he cast doubt on the document was in respect of the loss of oil and he suggested that the record probably did not contain a complete or accurate history of oil loss. His experience may well have given him reason to doubt the material in this way. In doing so, however, his evidence was neither necessary nor helpful. I do not consider that in doing this Mr Marosszéky was partial. In fact, his doubts as to PX 12 being accurate were later confirmed by Mr Cain who stated that PX 12 would not necessarily record all quantities of oil added T302.4 and .19. I think Mr Marosszéky was probably genuinely bringing his experience to the issue. I do not accept this, or other ways in which he cast doubt on PX 12, as a basis for preferring Mr Cain's evidence over that of Mr Marosszéky. I would add that Mr Marosszéky was not alone in casting doubt on the accuracy of PX 12. Mr Cain also cast doubt on it and, in a way, I found not to be helpful and I deal with that in paragraph 132.

101. Against the background of Mr Marosszéky's view that oil leakage is not permissible lies an amount of evidence that, leading up to 4 March 1992, oil was leaking from the APU. This evidence is in PX 12 and is as follows:
8 January 1992, 100ml of oil added;
18 January 1992, low oil;
13 February 1992, APU oil level adjusted;
16 February 1992, 100ml oil added.

Existence of cabin smells
102. The BAe had problems with cabin smells from the time that they were acquired by the defendant in 1990. In fact, it was a worldwide problem with the BAe and this was well known to the defendant.

103. Cabin smell remained an ongoing problem up to 4 March 1992. This was acknowledged by the defendant. There were several references to smell problems in PX 12. PX 26 also contains about seven references to smell complaints between January 1992 and 1 March 1992.

104. In relation to cabin smells, there were entries of some note in PX 12:

(a) on 24 February 1992, is an entry "APU AIR NOT FIT FOR HUMAN CONSUMPTION";

(b) on 2 March 1992, is an entry of oily vapour in the cabin with "BURNING SMELL";

(c) on 3 March 1992 is the following entry:

"APU & SURROUNDING AREA CLEANED OIL LEVELS CHECKED OK NO EVIDENCE OF OIL CONTAMINATION IN ARI [sic] DUCT AIR CON PACKS RUN ON FULL HOT FOR 15 MINS. OIL SMELL STILL VERY STRONG
MEL 49-50-1 APPLIED"

105. There are a couple of things to note about this last entry. The first thing to note is that despite all investigations, the oil smell is described as still very strong. The next thing to note is that even though the air conditioning packs were run on full hot for 15 minutes, the oil smell

was still very strong. The idea of running the air conditioning packs on full hot for 15 minutes was to clear them of their smell. That it did not leaves the APU as a possible source of the smell and this was the day before the failure of the compressor seal.

Defendant's attempts to find the source of the cabin smells

106. There was what Dr Lewis, a medical practitioner formerly employed by Ansett, described as a smell problem and a seal problem. The seal problem from the outset was a problem with seals of the engines and the APU. The predominant problem from the beginning was with the engine seals. Over a period of time, the defendant got on top of the problem with the engine seals T354.39 and efforts were then focussed on the APU as the source of the smells in the cabin. That is consistent with Dr Lewis's evidence that the defendant had got on top of the engine seal problem and "then it became apparent that we had the same problem in the little auxiliary power unit" T354.40. Dr Lewis could not say when it was that the defendant got on top of the engine seal problem. PX 12 suggests that this was before 4 March 1992.

107. This now requires an explanation of the significance of PX 12. This document is part of a much larger document consisting of some 200 to 300 pages. The 200 to 300 pages are part of a much larger log. The 200 to 300 pages contain a full history of anything to do with smell in relation to the aircraft T323.47. Those pages are part of a recording system that regulations required the defendant to maintain. The regulations required the defendant to maintain a log book. This was maintained through a computer system that recorded all data relevant to the aircraft. That computer log then became a real-time indicator of how the aircraft was performing hour-by-hour during its operation T286. From this log record, for this case, the database had a query put into it whereby the reference to smell in relation to VH-EWS produced PX 12 and the other 200 to 300 pages, being a full history of smells associated with engines or the APU. These pages were produced on 4 May 1998 when Ansett was still operating. From PX 12, it can be discerned that, leading up to 4 March 1992, the efforts and investigations were concentrated on the APU as the source of the smells.

108. PX 12 shows multiple investigations by the defendant with a view to locating the cause of the problem which was the oily smell in the cabin of the aircraft. These investigations were looking for possible oil leaks in the APU T321.44. Mr Cain suggested that PX 12 would not contain records of the investigations targeted at engines as they would be in different documents referred to as ATA 73 and 75 T321.46. The difficulty with this is twofold. The first is that PX 12 does contain some references to engines as the source of the smell. The second is in the way Mr Cain explained PX 12 it should contain records of all investigations relating to engines and the source of the smells T323.47. Further, the defendant did not tender any material from ATA 73 or 75 or seek any adjournment for the purpose of doing so or offer any explanation for the absence of such material.

109. It is apparent that the defendant knew of the oily smell in the cabin well before 4 March 1992 and it attempted to locate the source of the smell. The defendant was alert to the possibility, maybe even probability, that the smell was emanating as a result of an oil leak in the APU. It undertook investigations to try to source an oil leak there.

Advice received by the defendant as to the source of the cabin smells

110. The APU generally, though not necessarily exclusively, in relation to BAes was also implicated in other materials available to the defendant before 4 March 1992 as a source for smells in the cabin of the aircraft:

(a) engine or APU oil compressor seal failure can cause oil contamination of air PX 27;

(b) ongoing investigations suggest failure of the compressor oil seal PX 28;

(c) oil smells alone could be due to degradation of the compressor seal PX 28;

(d) if, after checks, smell persists, the compressor seal must be suspected PX 28;

(e) cause of cabin smell can be oil from APU compressor seal failure PX 14.

111. This material is consistent with an opinion expressed by Mr Marosszéky as follows:

"This engine also has carbon seal installations with the same issues as the engine and is a known source of air contamination through the front compressor seal, cooling fan seal and APU plenum to gearbox seal." PX 11A, paragraph 12

Analysis

112. Before 4 March 1992, the defendant was concentrating its efforts on the APU as the source of the cabin smells.

113. Leading up to 4 March 1992, there were two possible sources for the smell in the cabin of the aircraft. They were the engines or the APU. I think the engines can be excluded as a source in the weeks leading up to 4 March 1992. The first thing to note here is that Dr Lewis said that the biggest problem in the beginning was engine seals, but "we got on top of those" T354.39. The next thing to note is that PX 12 reveals that leading up to 4 March 1992, with an exception in January 1992, all efforts and inquiries were directed at the APU as the source of the smells.

114. Mr Cain's view was that the smell was not coming from the APU. His view was that it was probably the engines that were the source of the smells. I do not accept that view. Dr Lewis's evidence, married with PX 12, is against it. If there was anything in the other 200 to 300 pages to show that the defendant was investigating the engines as a possible source of leak, they could have been tendered. If there was anything in ATA 73 or 75, the defendant could have tendered them or offered an explanation for their absence.

115. Mr Marosszéky was also of the view that the APU was the probable source of the cabin smells. He thought that the most obvious cause for the loss of oil requiring replenishment by the addition of 100ml of oil on 16 February 1992 was the compressor seal T196.08. He thought that the entry of 24 February 1992 where the APU air was described as not fit for human consumption indicated that the oil was being dumped into the compressor during the operation T198.19 and that it was obvious that the seal was leaking oil PX 11B, p4, No. 34. He thought that oily vapour in the cabin with a burning smell on 2 March 1992 could be coming from the APU or the engines, but more probably the APU T203.22. He thought that the oil smells still very strong on 3 March 1992 were probably sourced to the APU T204.21. The history of topping-up of oil suggested a problem with oil consumption and it was more likely coming out of the compressor seal T227.24.

116. I find that leakage of oil through the compressor seal was the cause of smells in the cabin in the weeks leading up to 4 March 1992 and that the defendant should have been aware of

that. There was a combination of matters here that leads to that view including that oil should not leak from the APU, that the defendant had information to that effect PX 39, that oil was leaking from the APU before 4 March 1992, that there were smells of oil in the cabin of VH-EWS before 4 March 1992 including a burnt smell on 3 March 1992 and that the defendant had got on top of the problem of the engine seals as a source of the smell and was focussing its attention on the APU. The defendant also had advice that if smell persisted despite checks, the compressor seal should be suspected as the source of the leak. The smell did persist despite checks and the defendant should, therefore, have suspected the compressor seal as the source of the leak.

117. The evidence does not disclose, other than by inference by its investigations, that the defendant did suspect the compressor seal as the source of the leak, but its case is that it carried out all possible checks and satisfied itself that there were no leaks from the APU and that the event that happened was unpredictable.

118. The defendant relies largely on the evidence of Mr Cain. He says that if failure of the seal was foreseeable, he would have expected oil loss to be evidenced by oil dripping out of the fuel oil drain mast at the front of the engine. In the absence of oil coming from the fuel drain mast, there would be no reason to suspect imminent cracking or fracturing of the seal T294. The fact is oil was escaping without this indicator being apparent. This may not mean much because the amount escaping was not large and Mr Cain was not asked about the absence of this indicator in light of the escape of the amount of oil recorded in PX 12. The point is, however, this cannot be much of an indicator for cases of relatively small, though important, amounts of oil escaping. Asked whether there might be any other indications, Mr Cain said there could be smells in the cabin, but those smells might have come from other sources. For reasons already given, in my view, the source of the smells in the weeks leading up to 4 March 1992 was the APU. Another indicator of oil loss, he stated, would be low oil level in the sight glass T297. Presumably, this would be recorded in PX 12 if the level was low. Even so, there was oil loss, but it may not have been at a level low enough to be recorded as low. The sight glass allows the viewer to see a tube with gradations on it. It is a bit like the dipstick in the engine of a car, but with more gradations T298.25. It is apparent that a level below full is not necessarily low so that even if oil was being lost, it would not necessarily be recorded.

119. Mr Cain was cross-examined about the compressor seal as a source of the leak. He agreed that, from very early, it was known that engine or oil compressor seal failure could cause oil contamination of the bleed air supply to the air conditioning pack which could, in turn, lead to smells in the cabin. He agreed that BA had identified the failure of compressor seals as a likely cause of oil smells in the cabin and that it had advised the defendant that a failure of the seal could result in ingestion of oil contaminated by air from the APU into the aircraft. He also agreed that if smoke was witnessed, leak of the compressor oil seal must be suspected T303.50-304.01. Oil smells alone could be due to the degradation of the compressor seal T304.11. In these circumstances BA issued a checklist of things to do. If, having completed the checks, the smell persisted, the compressor seal was to be suspected PX 28. Something must then be done either by way of further investigation or to change the engine or the APU or tear it down and rebuild it T304.23. He agreed that, if after investigation, there remained a suspicion that there was a leak in the compressor seal, that the correct procedure would be to change the engine or the APU, that is if the leak was confirmed as a leak T305.31. If it was suspected as a leak, you would do further testing. If further testing left you with a suspicion, you would not necessarily change the engine T305.34. He stated that if there was a suspicion

that a compressor seal was leaking oil despite testing and the suspicion persisted, it would be appropriate to isolate the source and apply MEL as long as the suspicion persisted T305.44-49. I make some comments about this evidence in considering the reasonableness of the defendant's response to the foreseeable risk of injury.

120. Mr Cain says the APU compressor seal had not been confirmed as the source, but nor had anything else and, if the APU compressor seal was to be excluded on his test, then every other source should be excluded too. I remain impressed by the literature from the authorities that should know PX 27, 28 and 14 that if, despite investigation, smell persists then it is appropriate, if not necessary, to suspect the compressor oil seal.

121. Mr Marosszéky's view is consistent with this. He stated:

"Carbon seals are very delicate devices and rely on precise tolerances to maintain their sealing quality, depending on design and quality of construction (manufacture) they can easily be damaged or degraded in the ability seal. Once a leak is detected, the source of the leak would also have to be identified, however unless an engine tear down is performed the precise nature of the failure will not be known." PX 11A, paragraph 8

"This is a critical point as engine oil leaks of any description should not be permitted to continue as they can lead to catastrophic engine failure, not to mention the possibility of dumping oil into the engine compressor and pumping it through the air conditioning system." PX 11A, paragraph 9

122. In his comments on the entry of 28 February 1992 in PX 12, which included "V BAD SMELL", Mr Cain stated that the cause of the smell was the oil being pyrolysed. He stated that the source of the smell could have been either the APU or the main engines. Two things may be noted about this. The first is that the defendant was aware, or at least if it had applied its mind to it at the time was capable of being aware, that the smell in the cabin was from the pyrolysed effects of oil. The second is that Mr Cain was acknowledging the possibility of the APU as being the source of the smells despite borescopic examination on 26 February 1992 finding no faults.

123. It was foreseeable that if the problem was not fixed, there would be a continuation of the oily smell in the cabin. It was foreseeable that if the problem was not fixed, pyrolysed oil in large quantities could be pumped through the air conditioning system into the cabin of the aircraft. That foreseeable event occurred.

124. Once the defendant knew of the problem of the oil smell in the cabin, it was appropriate for it to take remedial action to try to fix it. The question arises as to whether the action it took failed to meet a proper standard of care. That will depend in part on what was foreseeable to the defendant by way of risk to the plaintiff's health.

Was injury foreseeable?

125. Both Dr Crank and Dr Markovic agreed that smoke from pyrolysed oil can be hazardous to the eyes, mucous membranes and lungs. Dr Crank expressed the view that it can be severely irritating and damaging to the human respiratory system. I would not understand Dr Markovic to disagree with that T279.16. In fact, Professor Crank took the view that any smoke could be severely irritating and damaging to the human respiratory system T123.01 -.06. I accept that

evidence. The adverse effects will depend on such things as the content of the smoky products and the nature and extent of the exposure. Those variables tend to go to how quickly, if at all, a person may recover from exposure.

126. There was a history of complaints relating to health in relation to VH-EWS before 4 March 1992 PX 26. That history included several complaints relating to breathing difficulties in January and February 1992.

127. There was also an MSDS DX 10 for Mobil Jet Oil II. This document was available to the defendant. The document provided information in relation to risks of injury from inhalation. This was in relation to the inhalation of the oil or vapours of the oil, but it did not extend to the inhalation of the pyrolysed effects of oil. It did, however, include the following:

"product is suitable for burning in an enclosed, controlled burner for fuel value or disposal by supervised incineration".

128. This would be suggestive of the effects of the burning of the oil being harmful to human health and, in any event, if the inhalation of vapours of the oil was potentially harmful to health, I would think so would be the smoke from its being pyrolysed. I do not understand the defendant to contest this aspect of the case.

129. It was foreseeable, in my view, that if the source of the ongoing smell in the cabin of the aircraft was not traced and fixed, it could result in harmful quantities of pyrolysed oil entering the cabin of the aircraft and that this could be harmful to the plaintiff's health.

What was a reasonable response?

130. The next issue to consider is what a reasonable response to the foreseeable risk of injury should have been. Varying suggestions were made from stripping the engine to switching off the APU or operating the aircraft without it. Mr Cain suggested that stripping down was not necessary because there was no evidence of any major oil leakage from the APU.

131. There was no evidence as to what stripping or changing the APU would involve. There was no evidence as to how long it would take, how much it would cost or how long VH-EWS would be unable to fly. I assume it would have been a major project. It would, however, not have been impractical as removing the APU was, in fact, recommended on 1 March 1992.

132. In PX 12, was the entry 24 February 1992 "APU AIR NOT FIT FOR HUMAN CONSUMPTION". Mr Cain thought that did not necessarily mean that the air was coming from the APU. On 1 March 1992 was a further entry "NIL LEAKS COOLING FAN APU, SUGGEST REMOVAL OF APU". Mr Cain passed both entries off as not being reliable or accurate records. In particular, he passed the second entry off as somebody making a statement without proper knowledge of what was going on. It could have been an engineer or a pilot making a statement that he thinks something should be done. He later agreed it would not fall to a pilot to make such a suggestion and that it would have to be an engineer. When it was put it to him that engineers do not make those suggestions for no reason, his answer was that they make it on gut feeling. He later agreed it was not a recommendation that would be made lightly and there would have to be a confirmed defect. This entry is in a document of the utmost importance. It was a document that Mr Cain described as enabling one to see the hour-by-hour history of this particular aircraft. It is a document that anybody picking up

should be able to rely on for its accuracy and that must have been known to the engineer who made the entry.

133. What one has then is nine days before 4 March 1992 a description that the APU air is not fit for human consumption and three days before 4 March 1992 a recommendation that the APU be removed. On top of that is the history in PX 12.

134. PX 12 reveals ongoing issues with oil smells in the cabin of VH-EWS and mechanical, electrical and other failures. I do not think it is necessary to track through the whole history in PX 12, but a number of things may be noted:

(a) the four recorded instances of oil loss;

(b) the APU should not have been losing oil;

(c) at least from 16 February 1992, from time to time, an MEL was applied. This allowed VH-EWS to fly without the APU operating. It was applied on and off up until 1 March 1992;

(d) on 1 March 1992, it was suggested that the MEL be removed;

(e) on 3 March 1992, the air conditioning packs were run on full hot for 15 minutes to clear them of their smell. That failed, suggesting the smell was coming from another source. I accept Mr Marosszéky's opinion that the likely source was the APU or the engines and the APU was the more likely source as it was the only one operating T204.22. Also for reasons given earlier, I think the engines were an unlikely source by 4 March 1992;

(f) in relation to the entry of 3 March 1992 an MEL was applied. It was applied because of the APU air T321.35;

(g) the MEL was removed on the basis of a borescopic examination failing to reveal any oil leak T321.37. It is an appropriate and proper form of examination for such purpose. Mr Cain described it as "reasonably accurate" T287.10. If it detects oil residue, it will have established that there is an oil leak. It may even detect the source of the oil leak. It is possible, however, for there to be an oil leak leaving no residue so that a borescopic examination will reveal neither oil residue nor leak. It is common ground that the borescope is not capable of inspecting the whole of the compressor seal. There was debate as to whether it was capable of inspecting any part of the compressor seal. The compressor seal is an air/oil seal and it is common ground that the borescope was not capable of visualising the oil part of the seal T306.24 and 331.06. It was that part of the seal where the crack developed in this case enabling the oil to escape. Whilst borescopic examination was appropriate its result, in the absence of a positive finding of oil residue or source of oil leak, could not be taken as conclusive. Borescopic examination was not the only diagnostic process undertaken by the defendant. Black light or ultraviolet light T287.15 were said by Mr Cain to have been used to detect traces of oil, although there is no specific reference to this in the documentary material. These lights look for traces of oil. There are limitations with the use of black light or ultraviolet light. With the APU running, if oil was leaking it would be exposed to temperatures causing pyrolysis and leaving no trace of oil detectable by black light or ultraviolet light. It is not entirely clear from the evidence to what extent oil would leak after the APU was switched off. It might be inferred from what Mr Cain said that oil may leak when the engine is running

or when it is rotating for a time after it is switched off T290.33. There is considerably less potential for oil leakage when the APU continues to rotate after it is switched off T308.34. Yet at another point, Mr Cain said that when the APU is switched off "no oil is being bed (sic – "bled") into the furnace to be burnt" T307.25. If this is so, the only oil escaping would have been pyrolysed leaving no trace for detection by black light or ultraviolet light. Considering this evidence, I am not satisfied that the black light or ultraviolet light provides a reliable test for detecting oil leakage of the kind that occurred in this case;

(h) even on the defendant's case, as late as 4 March 1992, whilst Mr Cain was of the view that the engines were the source of the smell, he was speaking in probabilities. As thorough as he says the inspection of the APU was, the APU was not excluded as a possible source of smell.

135. By 2 March 1992, the defendant, in my view, should have implemented the action recommended in the SIL PX 28. The recommendation was to investigate the smell and if, after investigation, smell remained, then the compressor seal should be suspected as the source of the smell. With the compressor seal being suspected in these circumstances, the APU should be changed or torn down and rebuilt T304.23. In my view, suspicion alone after testing warranted and required that action. It was not good enough to wait until a source of the leak was confirmed as Mr Cain sought to do. An employer's duty to his employee to act in a reasonable way does not attach only when the employer knows, by way of confirmation, what the cause of a problem is, but it attaches when there are reasonable grounds to know or suspect what the cause of the problem is. In this case, in my view, there were ample grounds to suspect the compressor seal.

136. One of the problems with Mr Cain's approach was that a crack in the compressor seal of the nature that occurred in this case could never be detected by borescopic investigation because the borescope could not probe to that part of the seal where the crack occurred. By 3 March 1992, in my view, the situation had arisen whereby the defendant should have removed and stripped down or even changed the APU as suggested by the engineer on 1 March 1992. If that was not practical at that time, arrangements should have been put in place for that to be done at a convenient time. In the meantime, the defendant should have taken reasonable steps to protect the health of the plaintiff. A reasonable step, indeed a simple one, would have been to have applied the MEL so that the aircraft could fly without the APU operating. The MEL was in place on 3 March 1992 and, on the basis of a borescopic examination which could not be conclusive, removed before the plaintiff flew in VH-EWS on 4 March 1992. It should have been in place when the plaintiff flew in the aircraft on 4 March 1992.

The plaintiff's condition and its cause

137. The plaintiff claims she has RADS. This is supported by Professors Glanville and Bryant and Dr Burdon. It is opposed by Professor Breslin. I put to one side for the moment the evidence of Dr Burdon as he was not examined and cross-examined about the diagnosis to the extent that the others were.

138. Professors Glanville and Bryant agree that there is no definitive diagnostic indicator for a diagnosis of RADS. It is a diagnosis made as a result of considering a number of indicators, whether they are present in a particular case and the importance to be placed on particular indicators.

139. The indicators are:

(1) absence of preceding respiratory complaints;

(2) onset of symptoms after a specific exposure;

(3) the exposure being to gas, smoke, fumes or vapour;

(4) the onset of symptoms within 24 hours following exposure and persisting for at least three months;

(5) symptoms simulating asthma, being cough, wheezing and shortness of breath with dyspnoea predominating;

(6) lung function test showing airway obstruction;

(7) methacholine challenge test being positive;

(8) absence of cigarette smoking for a number of years;

(9) exclusion of other pulmonary diseases or diagnoses which might explain the symptom complex or cause of the cough.

140. In an ideal world, all these indicators would be present to make the diagnosis of RADS. However, it is not necessary that all be present. It is sufficient that some of them are. Whether enough are present will depend on matters such as whether a sufficient number is present and the importance to be attached to those indicators which are present and those which are not.

141. Professor Glanville put a lot of store on the last of the indicators, being what he called the "exclusion criteria" T154.25. Other indicators he thought were important were acute symptoms following a specific exposure and the onset of symptoms within 24 hours after the event.

142. Professor Bryant had a different emphasis on what he thought were the important indicators. He thought the important criteria were verification that exposure to an irritant occurred, objective evidence of an obstructive lung defect, development of symptoms following the exposure or in the event of a pre-existing history of symptoms a marked and material change of these symptoms following exposure and symptoms evolving within 12-24 hours after the exposure.

143. Professor Breslin says that the plaintiff does not have reactive airways. By definition, therefore, she does not have RADS. Some of the criteria for RADS were not merely indicators, but were fundamental. Professor Breslin thought that the following matters were fundamental:

(a) there should be symptoms simulating asthma T388.30. This is because RADS is a form of asthma T388.42. He acknowledged that asthma was not excluded by the lung function tests at St Vincent's Hospital on 15 February 2001 T389.21 and this was consistent with reactive airways T389.23, but that was at that time;

(b) the plaintiff should be reactive to the methacoline test, the saline provocation test and the

exercise test. All these tests are normal, therefore the plaintiff is not reactive to them, therefore she does not have asthma T389.38, 391, 395.

144. Professor Breslin thought that if the cough was due to RADS, she would have reactive airways and she does not, but she is still coughing T390.24, 395. The absence of reactive airways is not explained by the treatment she has undergone because it has not got rid of her cough T390.28. Therefore, not only does she not have reactive airways, but her cough is not due to reactive airways.

145. Professor Breslin thought that, accepting the history, it is difficult to deny the causal link between the event and the cough even though the diagnosis is not known T395.40. On the history, an occult reflux could have been activated T396.38.

146. Professors Glanville and Bryant plainly must have thought the challenge tests were not critical in diagnosing RADS. If they thought otherwise, they could not have diagnosed RADS as all tests were negative. Unfortunately, Professor Breslin's reasoning process, which I find to be compelling, was not put to Professors Glanville and Bryant.

147. I accept Professor Breslin's view that the plaintiff does not have RADS. His explanation is plausible, logical and makes sense. It makes sense that one cannot have RADS without reactive airways. His reasons as to why the plaintiff does not have reactive airways, I think, are compelling.

148. The plaintiff has been examined by Dr Gianoutsos for the defendant in February 2008. He was not called and his reports were not tendered. It was submitted that I should draw an inference that his evidence would not assist the defendant's case. I do not think that is the proper inference to draw. As Professor Breslin had given evidence, I think that the proper inference to draw is that his evidence would not have advanced the defendant's case any further than it had been advanced by Professor Breslin. I am prepared to draw that inference, but in light of my analysis of the medical evidence, it does not make any difference to the views I have expressed.

149. The result is that we are in a field where medicine does not provide any definitive or even probable answer. The diagnosis is unclear or unknown. In these circumstances I consider the history assumes considerable importance.

150. I find:

(a) the plaintiff had a cough that pre-existed 4 March 1992 as earlier described;

(b) the plaintiff had no cough from 1986 until 4 March 1992. I am aided in that by the plaintiff's history to Dr Yan and her lack of visits to doctors for cough in that period;

(c) the plaintiff has had a cough ever since 4 March 1992. I accept the husband's evidence about this;

(d) the plaintiff was exposed to pyrolysed effects of Mobil Jet Oil II on 4 March 1992;

(e) pyrolysed effects of Mobil Jet Oil II are harmful to the lungs.

151. In coming to the view I do about the plaintiff's condition and its cause, I am particularly impressed by a six year history before 4 March 1992 of the plaintiff's being cough-free, by the nature of the event of 4 March 1992, by the potential toxic effects of the pyrolysed oil, by the plaintiff's immediate reaction and by her continuing symptoms.

152. Professor Breslin initially thought that the plaintiff had an occult gastroesophageal reflux. Though the plaintiff has not been examined for that, Professor Breslin has gone off it as a likely explanation for her cough. It remains a possibility on the basis that the contaminants irritated the airways and set up a cough which set up a gastroesophageal reflux which caused the cough to continue T397.21. Professors Glanville and Bryant excluded gastroesophageal reflux, but they were not excluding the type of occult reflux described by Professor Breslin. They were excluding another entity altogether.

153. The plaintiff has eosinophils in her airways that could suggest an allergic basis for her cough. That is another possible explanation for the cough. It is on the basis of an aggravation or reactivation of a pre-existing condition.

154. Professor Breslin thought that the exposure did not provide the linking mechanism, but he did think it was difficult to dissociate the event from the cough T396-7. Professor Breslin's difficulty with the linking mechanism seems to lie at least in part on the view that oil does not produce allergy. This was simply a case of the plaintiff being exposed to oil which he did not think contained harmful products. "If she had been exposed to ammonia, or some really irritating agent, then it would be a bit easier ..." T397.26. The reference to ammonia is understandable as the irritating effects of that are something nearly everybody would know and understand. The pyrolysed effects of oil, in my view, were an irritating agent in the same sense.

155. I think one or other of two possibilities has occurred. Either the contaminants irritated the airways which set up a cough, which set up the reflux, which caused the cough to continue or the contaminants have irritated the airways causing an aggravation or reawakening of an underlying allergic condition resulting in the continuing cough. I do not think it matters which of these events is the correct one. Either way, the plaintiff's airways have been irritated with the result that her cough has been produced and it has remained now for some 17 years and is likely to continue for life. On either analysis, there is a pathological condition of the lungs caused by the exposure to the smoke.

Damages

156. The plaintiff's damages fall to be assessed under the WCA. This is because she does not have a dust disease within the meaning of the **Workers Compensation (Dust Diseases) Act** 1942. She, therefore, does not come within exclusion (c) of the definition of injury in s4 of the WCA. Therefore, she has an injury within the meaning of the WCA and damages are to be assessed under that Act. In earlier proceedings *Joanne Turner v Ansett Australia Limited* [2007] NSWDDT 26, I granted leave to the plaintiff to amend the statement of claim. That had the effect of Eastwest becoming a defendant in these proceedings. In those proceedings, a question was argued as to whether the amendment operated from the commencement of the proceedings on 23 November 2001 or from some other date. I offered the view that the amendment operated from the commencement of the proceedings, but did not make any order

to that effect. I thought it was not appropriate to make such an order as had been sought by the plaintiff. My view was that this result would be brought about by operation of law. My reasons for the opinion that the amendment operated from the commencement of the proceedings are set out in my judgment in those earlier proceedings and I do not repeat them here. I maintain the view that the amendment has effect from the commencement of the proceedings. The result of this is that the plaintiff's damages are to be assessed in accordance with the WCA as it applied without regard to the sweeping changes that were introduced late in November 2001.

Non-economic loss

157. I have recounted earlier in these reasons the symptoms the plaintiff has a result of her exposure to the smoke in the cabin of the aircraft on 4 March 1992. I need not recount that detail here. I summarise it by saying that she immediately had acute symptoms. She has had an underlying cough of the nature I have described earlier and has had that from about 4 March 1992. She has had a more aggressive cough in the form of more severe coughing fits that can last between two to seven days T99.30. There is no doubt that the symptoms have caused the plaintiff to be upset and annoyed, even angry. They are no doubt irritating to her and embarrassing. They are embarrassing to the extent that she perceives that people have a reaction to her cough, although that perception lies probably more in her understanding than in the reality of people's reactions. It is, nevertheless, real to her. I accept also that she has occasional incontinence. Some things in life are now denied to her and have been for some time and that includes such things as attending cinemas and concerts. The plaintiff is not the vibrant person she used to be.

158. Though her cough was present throughout the course of these proceedings, I did not find it intrusive or disturbing or distracting. There was never a need for a question or an answer or submission to be repeated because the cough had made it inaudible.

159. The plaintiff has had her symptoms now for about 17 years and will continue to have them for another 38 years approximately on the Life Expectancy Tables.

160. Assessment of non-economic loss is governed by s151G of the WCA as it was in March 1992. It provided:

"(1) No damages are to be awarded for non-economic loss unless the injured worker's ability to lead a normal life is significantly impaired by the injury suffered by the worker.

(2) The amount of damages to be awarded for non-economic loss is to be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.

(3) The maximum amount which may be awarded for non-economic loss is $204,000, but the maximum amount may be awarded only in a most extreme case.

(4) If the amount of non-economic loss is assessed to be $36,000 or less, no damages for non-economic loss are to be awarded.

(5) If the amount of non-economic loss is assessed to be between $36,000 and $48,000, the amount of damages to be awarded for non-economic loss is as follows:

Damages = [Amount so assessed - $36,000] x 4 ...

(7) Division 6 of Part 3 (Indexation of amounts of benefits) applies as if the amounts of $204,000, $36,000 and $48,000 were adjustable amounts and were referred to in section 81 (1).

(8) If an amount mentioned in this section:
(a) is adjusted by the operation of Division 6 of Part 3; or
(b) is adjusted by an amendment of this section,
the damages awarded are to be assessed by reference to the amount in force at the date of the injury."

The amounts specified were the amounts in force at the date of the plaintiff's injury.

161. The requirement that the plaintiff's ability to lead a normal life be significantly impaired before being entitled to non-economic loss was removed retrospectively by the **Workers Compensation Legislation (Miscellaneous Amendments) Act** 1994. In any event, I am satisfied that the plaintiff's ability to lead a normal life has been significantly impaired.

162. I am required to make an assessment of the plaintiff's entitlement to damages for non-economic loss by reference to a most extreme case. A most extreme case is not necessarily the worst case that can be imagined and the concept embraces a number of different situations. In my view, a fair assessment of the plaintiff's injuries and disabilities compared to a most extreme case is 25%. The figure available for a most extreme case as at 4 March 1992 was $204,000. Under the section, the plaintiff is entitled to 25% of that figure without any deductible component to be made from it. Accordingly, she is entitled to $51,000 for non-economic loss.

Economic loss

163. This is governed by s151H of the WCA which at the relevant time provided as follows:

"(1) No damages are to be awarded for economic loss unless the injured worker has received a serious injury or dies as a result of the injury.
...

(2A) A serious injury is, if received on or after the commencement of Schedule 2 (2) to the Workers Compensation (Benefits) Amendment Act 1991:
...
(b) an injury for which damages for non-economic loss of not less than $48,000 are to be awarded in accordance with the Division (whether or not compensation is payable under section 66).
...
(4) Division 6 of Part 3 (Indexation of amounts of benefits) applies as if the amount of $48,000 were an adjustable amount and were referred to in section 81 (1).
...
(6) If an amount mentioned in this section:
(a) is adjusted by the operation of Division 6 of Part 3; or

(b) is adjusted by an amendment of this section,
the damages awarded are to be assessed by reference to the amount in force at the date of the injury."

The amount of $48,000 specified was the amount in force at the date of the plaintiff's injury.

164. The assessment I have made for non-economic loss passes the threshold set by s151H(2A(b)) for economic loss.

165. The plaintiff's Further Amended Statement of Claim of 17 March 2009 merely claims loss of earning capacity on the open labour market. The plaintiff's particulars are barely more enlightening. It is apparent, however, that the plaintiff claims economic loss from 12 September 2002. There is no claim for economic loss from 4 March 1992 and 12 September 2002. I do not accept that the plaintiff lost any time from work in that period because of her cough. Not only is there no economic loss in that period, but this period of work also demonstrates a capacity in the plaintiff to undertake her work. She claims that she could not do the full range of her duties during that period because of her cough. That evidence is not corroborated and I do not accept it. It would also appear to be inconsistent with history given to Professor Bryant T165.12. When the plaintiff ceased work with Ansett, it was not the cough that caused the plaintiff to lose income, but the collapse of Ansett.

166. I have no reason to believe that if Ansett had not collapsed the plaintiff would not have been able to continue to do her work. Nevertheless, considering the symptoms that the plaintiff has, I consider that she would be at a disadvantage on the open labour market. In my view, she is therefore entitled to damages representing a loss of earning capacity. This is best covered, I think, by providing a buffer or cushion.

167. I reject the earnings relative to police officers' work as a useful guide. I reject also the plaintiff's claim for damages for loss of a chance to obtain employment as a police officer. The plaintiff was proceeding with her application to join the police service and intended to do so and was prepared to do general duties work. There was no indication on her part that she would be unable to do it. The only medical evidence in the case comes from Professor Glanville who supported her in her intention to pursue that work. It is fairly clear from Professor Glanville's report PX6B that the document addressed "TO WHOM IT MAY CONCERN" was a report in relation to her intention to undertake the police work. The plaintiff says that the only reason she did not pursue it was because of her cough and that Dr Papakostas told her that she would be unfit for the work. I do not accept what she says as evidence of Dr Papakostas's view. No evidence was called from him to support such a view.

168. The plaintiff has demonstrated that for ten years after the incident in March 1992, she has been capable of undertaking flight attendant work. She has also done work as an orthodontist's receptionist, although that was only for one week. She left of her own will. She was, in my view, capable of doing the work.

169. In my view, the plaintiff is capable of undertaking almost all tasks which would be available to her by reason of her education, training and experience. There is no doubt some limitation to what she can do by reason of her symptoms and her cough might be unappealing to some potential employers. She would lose time from work during the more severe coughing episodes. I think a fair assessment for loss of capacity for the past is $10,000, inclusive of

superannuation.

170. For the future, I think it is appropriate to assess of the plaintiff's loss of earning capacity by allowing a buffer. I bear in mind the matters I have already mentioned and also bear in mind that the plaintiff has about 171/2 years to go until 65 years of age. I allow a figure of $25,000 for the future, inclusive of superannuation.

Out-of-pocket expenses

171. For the past, out-of-pocket expenses are agreed at $3,353.96.

172. For the future, the plaintiff claims as follows:

general practitioner visits 3-4 per year @ $60 per visit;
spirometry on half the visits to GP @ $20 per visit;
specialist every 6-12 months @ $75-150 per visit, together with spirometry $20;
inhalers @ $60 per month;
cough mixture @ 1 bottle per week at $20 per bottle;
oral steroids and antibiotics once or twice a year @ $50 for each course; and
x-rays every 1 to 2 years at $50 per x-ray.

173. This claim is based on the evidence of Professor Bryant in PX 8C. In his oral evidence T174.20, it is apparent that Professor Bryant made his assessments on the basis of the plaintiff not being able to work and frequently requiring assistance to help her through the day. I do not accept that she is unable to work or frequently requires assistance to help her through the day and, accordingly, much of the foundation for the views expressed by Professor Bryant falls away.

174. Professor Glanville had difficulty assessing the likely cost of the plaintiff's ongoing expenses, but estimated they would be in the order of $2,000 per annum PX6D. This is close to Professor Bryant's assessment.

175. The defendant's case that the plaintiff's history of treatment so far is an indication of the treatment she is likely to require in the future has merit. This would mean that she would not require visits to the general practitioner or the specialist or the spirometry testing or the x-rays to the extent suggested by Professor Bryant, nor do I think her consumption of medications is likely to be as extensive as Professor Bryant has suggested. I do not consider the evidence supports the consumption of medication to the extent claimed by the plaintiff. Medical evidence supporting the consumption of medication to the extent claimed by the plaintiff was not forthcoming. The plaintiff could not recall how often she had seen Dr Papakostas over 2002 to 2004, but it may have been only a few times. There was no evidence tendered from Dr Papakostas, nor any evidence from other general practitioners from 2002 to date. It is difficult to get any definitive guide from the amount of the plaintiff's out-of-pocket expenses to date because there is no indication of what those expenses were for or over what period they were incurred, but the amount involved would not suggest that the plaintiff will require ongoing treatment and medication to the extent claimed. If the plaintiff were to be allowed damages for future out-of-pocket expenses to the extent suggested by Professor Bryant, she would be allowed about $40,000. I think $15,000 is more realistic and reasonable.

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176. The plaintiff's damages in respect of this head of claim are governed by s151K of the WCA. At the relevant time, it provided:

"(1) An award of damages is not to include compensation for the value of services of a domestic nature or services relating to nursing and attendance which have been or are to be provided to the injured worker by a member of the same household or family as the injured worker, except in accordance with this section.

(2) No compensation is to be awarded unless the services are provided, or are to be provided, for not less than 6 months and may be awarded only for services provided or to be provided after the 6-month period.

(3) No compensation is to be awarded if the services would have been provided to the injured worker even if the worker had not been injured.

(4) No compensation is to be awarded unless the services provided or to be provided are not less than 6 hours per week and compensation may be awarded only for services provided or to be provided after the first 6 hours."

177. The thresholds provided by sub-sections 2 and 4 were abolished retrospectively by the **Workers Compensation Legislation (Miscellaneous Amendments) Act** 1994. That Act also repealed sub-section (1) and substituted:

"(1) Compensation, included in an award of damages, for the value of services of a domestic nature or services relating to nursing and attendance:
(a) which have been or are to be provided by another person to the injured worker; and
(b) for which the injured worker has not paid or is not liable to pay,
must not exceed the amount determined in accordance with this section."

178. The plaintiff claims as follows:

(a) she says that she is unable to tolerate chemicals and fumes and I think that is reasonable. As a result, she says her husband needs to spend about one hour per week undertaking tasks that require the use of chemicals where she would be exposed to fumes. These tasks include things such as cleaning the shower or the oven. One hour per week is claimed. The husband's evidence is consistent with this T99.41. The husband did say that the plaintiff did this work at times, but it did not seem to be very often. In any event, in my view, with her condition, she should not be unnecessarily exposed to chemical cleaning agents. I think this claim is reasonable;

(b) in the periods when she has the more aggressive coughing, she claims six hours per day for occasions when she is bedridden as a result of the cough PX 2, paragraph 75. I reject that claim as I do not consider the evidence supports occasions of the plaintiff being bedridden, apart from a couple of occasions her husband gave evidence about and they being two minor incidents, and possibly even unrelated, may be ignored;

(c) also in respect of the periods of worsened coughing episodes, the plaintiff claims four hours

per week over six weeks for care and assistance provided by her husband PX 2, paragraph 76. Her evidence suggests that these episodes occur about four times a year. The husband's evidence is that these episodes would last for two to seven days T96.29 and 99.30 and that they occur about six times a year. The jobs that he described doing on these occasions may be put in three categories T96.42-44 and 99.47:

(i) tasks that are not compensable in any event. These include tending to the pet T99.48;

(ii) tasks that are not compensable in this case, because they are tasks the husband would probably have undertaken in any event such as seeing that the children practised their musical instruments T101.31;

(iii) tasks that might otherwise be compensable.

179. There are several problems with entitlement to damages in respect of the third category. The first is that damages for this head of claim arise because of a need in the plaintiff resulting from her injury *Van Gervan v Fenton* [1992] HCA 54; (1992) 175 CLR 327. In my view, the evidence does not support such a need. It does not support that there are specific tasks that the plaintiff is unable to do. The husband said she has never been in a condition where she has been unable to care for the children T102.11. That barely leaves any need that could be compensable. The next point is that the evidence does not support an inability to do particular tasks that need to be done during the period of inability. It is in the nature of household tasks that many can be deferred for a day or two. The evidence does not support that the plaintiff had an inability to do any tasks that could not be deferred until she became able to do them. The next problem with this head of claim is that the evidence did not disclose what time was devoted to each of the three categories above, so that there was no evidence as to the time occupied in undertaking tasks that might be compensable. I reject this aspect of the plaintiff's claim.

180. I think it is reasonable to allow one hour per week in respect of tasks that need to be undertaken by reason of the plaintiff's reaction to chemicals and fumes.

181. I allow the plaintiff one hour per week from March 1992 to the present. The plaintiff is entitled to damages at the statutory rate under s151K. That has varied from 1992 to the present. The plaintiff has put that $17.69 per hour is an average over the period and I do not have anything to contradict that. I allow the plaintiff damages accordingly. The amount would be slightly in excess of $14,000. To allow for occasions when the plaintiff did the work herself, I reduce the figure to $14,000.

182. As to the future, I allow one hour per week at $22.62 for 38 years for which the 5% multiplier is 902, being $20,403.24. The plaintiff's schedule claims damages in accordance with a 3% multiplier, but s151J of the WCA requires a 5% multiplier.

183. **Summary of figures**

Non-economic loss (para 162)	$51,000.00
Past loss of earnings (para 169)	$10,000.00
Future loss of earnings (para 170)	$25,000.00

Past Out-of-Pocket expenses (para 171)	$3,353.96
Future Out of Pocket expenses (para 175)	$15,000.00
Past *Griffiths v Kerkemeyer* (para 181)	$14,000.00
Future *Griffiths v Kerkemeyer* (para 182)	$20,403.24
Total	$138,757.20

Interest

184. The above figures make no allowance for interest. The parties agreed that the question of interest should be reserved pending my decision on the other issues in the case. I propose to make directions dealing with the matter of interest.

185. **Orders, Directions, Notations**

(1) I enter a verdict in favour of the plaintiff.

(2) Should the plaintiff wish to make a claim for interest, I direct that a written submission be filed and served in support of such claim by 12 May 2009.

(3) In the event that the plaintiff files and serves a written submission in accordance with (2) above, the defendant is to file and serve any written submission in reply by 19 May 2009.

(4) If either party wishes to call oral evidence in respect of the claim for interest, that should be indicated in the written submission.

(5) The matter is to be listed before me on 20 May 2009.

(6) On 20 May 2009, if there is to be no application for interest, judgment will be entered in favour of the plaintiff in the sum of $138,757.20.

(7) On 20 May 2009, if there is to be an application for interest, the parties should be in a position to call oral evidence and to argue the matter.

Supreme Court of New South Wales - Court of Appeal

East West Airlines Limited v Turner [2010] NSWCA 53 (1 April 2010)

Last Updated: 6 April 2010

NEW SOUTH WALES COURT OF APPEAL

CITATION:
East West Airlines Limited v Turner [2010] NSWCA 53

FILE NUMBER(S):
2009/00298331

HEARING DATE(S):
22 March 2010

JUDGMENT DATE:
1 April 2010

PARTIES:
East West Airlines Limited - Appellant
Joanne Turner - Respondent

JUDGMENT OF:
Allsop P Handley AJA Hoeben J

LOWER COURT JURISDICTION:
Dust Diseases Tribunal

LOWER COURT FILE NUMBER(S):
DDT 428/01

LOWER COURT JUDICIAL OFFICER:
Kearns J

LOWER COURT DATE OF DECISION:
5 May 2009

COUNSEL:
C Leahy SC/J Turnbull - Appellant
JA McIntyre SC/DR Toomey - Respondent

SOLICITORS:
Curwoods Lawyers - Appellant
Turner Freeman Lawyers - Respondent

CATCHWORDS:
PRACTICE AND PROCEDURE - amendment to statement of claim - mistake in name of party - application of subsection 64(4) Civil Procedure Act - significance of words "as if" - amendment to take effect from date of filing of statement of claim - DUST DISEASES TRIBUNAL - jurisdiction - smoke in aircraft cabin - whether smoke was dust - whether plaintiff suffering from dust-related condition - APPEAL - appeal from decision in point of law only - whether finding that smoke contained dust was a decision in point of law - whether appeal available in relation to judge's finding as to damages - application to amend notice of appeal - point not taken before Tribunal - whether further evidence could have been adduced - whether proposed amendment challenged a decision in point of law - discretionary issues.

LEGISLATION CITED:
Civil Aviation (Carriers' Liability) Act 1959 (Cth)
Civil Procedure Act 2005
Dust Diseases Tribunal Act 1989
Income Tax Assessment Act 1936
Supreme Court Act 1970
Uniform Civil Procedure Rules 2005
Workers Compensation Act 1987
Workplace Injury Management and Workers Compensation Act 1998

CATEGORY:
Principal judgment

CASES CITED:
Amaca v Cremer (as Executor of the Estate of the late Winifred Cremer) [2006] NSWCA 164; (2006) 66 NSWLR 400
Attileh v State Rail Authority [2005] NSWCA 64; (2005) 62 NSWLR 439
Azzopardi v Tasman UEB Industries Limited (1985) 4 NSWLR 139
Bondi Beach Astra Retirement Village Pty Limited v Hohman [2010] NSWCA 38
B & L Linings Pty Ltd v Chief Commissioner of State Revenue [2008] NSWCA 187
Bridge Shipping Pty Limited v Grand Shipping SA (1991) 173 CLR 231 at 260-261
East End Dwellings Co Limited v Finsbury Borough Council [1952] AC 109 at 132
Evans Constructions Co Limited v Charrington & Co Limited [1983] QB 810
Fernance v Nominal Defendant (1989) 17 NSWLR 710 at 721
HIA Insurance Services Pty Ltd v Kostas [2009] NSWCA 292

Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1
Lloyd Steel Co (Aust) Pty Limited and Anor v Jade Shipping SA and Anor (1985) 1 NSWLR 212
NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation (1956) 94 CLR 509
Union Fidelity Trustee Company of Australia Ltd v The Commissioner of Taxation [1969] HCA 36; (1969) 119 CLR 177 at 187

TEXTS CITED:

DECISION:
Appeal dismissed with costs, including the costs of the amendment application.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

2009/298331

DDT 428/2001

ALLSOP P

HANDLEY AJA

HOEBEN J

Thursday 1 April 2010

EAST WEST AIRLINES LTD v Joanne TURNER

JUDGMENT

1 The judgment of the Court was delivered by HOEBEN J: The appellant appeals from judgments delivered by Kearns J in the Dust Diseases Tribunal on 27 August 2007 and 5 May 2009. The first of those judgments related to the joinder of the appellant to the proceedings as a defendant. The second decided liability in favour of the respondent and awarded damages in her favour against the appellant.

2 The appeal is brought pursuant to s 32 of the *Dust Diseases Tribunal Act* 1989 (the Act) which relevantly provides:

> "32(1) A party who is dissatisfied with a decision of the Tribunal in point of law or on a question as to the admission or rejection of evidence may appeal to the Supreme Court."

It was common ground that the appeal did not relate to "the admission or rejection of evidence".

Proceedings before the Tribunal

3 On 4 March 1992 the respondent was employed by the appellant as a flight attendant. On that date she was on a flight between Sydney and Brisbane on a BAE 146 aircraft operated by the appellant. Although the respondent was not on active duty on that flight, she was in the course of her employment.

4 As the aircraft was descending into Brisbane, for a period of about 20 minutes, smoke was emitted into the cabin. There was a thick cloud of smoke. The immediate effect of that smoke upon the respondent included coughing, a burning throat, sore eyes and a headache. Thereafter the respondent suffered from a persistent cough. On occasions the cough worsened, particularly when the respondent had a cold. His Honour found that there was "an underlying cough which is emitted every couple of minutes". It was not "loud or intrusive or distracting". There was also "a more aggressive cough which the plaintiff has occasionally" (Red 111D).

5 The cough did not cause the respondent to lose any time from work. She continued to work as a flight attendant (taking time off for two pregnancies) until 4 March 2002. Her cessation of employment was not related to the cough.

6 On 23 November 2001 the respondent commenced proceedings in the Dust Diseases Tribunal (the Tribunal) against Ansett Australia Limited (Ansett). She alleged that between 1990 and 1998 she was employed by Ansett and was negligently exposed by Ansett to fumes, chemicals and dust as a result of which she developed her cough.

7 On 9 September 2003 Ansett filed a defence in which it admitted that it employed the respondent during that period. Subsequently, the solicitors for Ansett discovered that between 1990 and 31 October 1993 the plaintiff had not been employed by Ansett but by the appellant. On 18 October 2006 Ansett applied by motion to amend its defence accordingly.

8 On 1 December 2006 the respondent applied by way of notice of motion to "join" the appellant to the proceedings "as if East West Airlines Limited were a party from the date of filing of the plaintiff's original statement of claim". The application was made pursuant to sections 64(1) and (4) and 65(1), (2) and (3) of the *Civil Procedure Act* 2005 (NSW) (CPA).

9 The significance of the date on which the joinder was to take effect arose from amendments to the *Workers Compensation Act* 1987 (WCA) and the *Workplace Injury Management and Workers Compensation Act* 1998 (WIM Act) which took effect on 27 November 2001. Those amendments substantially reduced an employee's entitlement to damages at common law in claims against an employer. The application of the amendments depended upon the date on which proceedings were commenced, i.e. proceedings commenced before the commencement date were not affected by the changes, but proceedings commenced after were so affected, regardless of the date on which the cause of action arose. A detailed analysis of the amended legislation and its effect is set out in *Attileh v State Rail Authority* [2005] NSWCA 64; (2005) 62 NSWLR 439.

10 The motions were heard in the Tribunal on 27 November 2006 and 6 August 2007. The motion by Ansett was not opposed. His Honour delivered judgment on 27 August 2007 in

respect of the respondent's motion.

11 His Honour characterised the respondent's application as one to "substitute a party rather than to add one". He applied s 64 CPA on the basis that there had been "a mistake in the name of the party" within the meaning of s 64(4) CPA. Although his Honour refused to make an order to that effect he made it clear that the date on which the statement of claim was filed was the date on which the amendment should take effect.

12 After the amendment, the relevant paragraphs of the statement of claim read as follows:

> "1B From on or about 1990 to on or about 30 October 1993 the plaintiff was employed by the second defendant as a flight attendant upon the BAE 146 aircraft. During the course of this work upon the BAE 146 aircraft the plaintiff was exposed to and inhaled dust and fumes emanating from the aircraft engine. The dust and fumes inhaled by the plaintiff contained vapourised oil, mist and other toxic elements.
>
> 2 From on or about 1 November 1993 to on or about 1998, the plaintiff was employed by the first defendant as a flight attendant upon various aircraft including the F27, the F28 and the BAE 146. During the course of this work upon the BAE 146 aircraft, the plaintiff was exposed to and inhaled dust and fumes emanating from the aircraft engine. The dust and fumes inhaled by the plaintiff contained vapourised oil, mist and other toxic elements."

(The reference to the "first defendant" is a reference to Ansett and the reference to the "second defendant" is a reference to the appellant.)

13 At some time before the hearing, the respondent's claim against Ansett was resolved so that the hearing proceeded only against the appellant. The hearing of the claim against the appellant took place before his Honour on 16 – 19 and 25 – 30 March and 1 and 7 April 2009. His Honour delivered his reasons for judgment on 5 May 2009. In those reasons his Honour made the findings as to the respondent's cough previously referred to. He then considered whether the Tribunal had jurisdiction to hear the claim.

14 The Act does not provide a definition for "dust". Section 10(1) of the Act provides that the Tribunal has exclusive jurisdiction to hear and determine proceedings referred to in sections 11 and 12. Section 12 is not relevant. Section 11(1) of the Act relevantly provides:

> "11(1) If:
>
> > (a) A person is suffering, or has suffered, from a dust-related condition or a person who has died was, immediately before death suffering from a dust-related condition, ...
>
> proceedings for damages in respect of that dust-related condition or death may be brought before the Tribunal and may not be brought or entertained before any other Court or Tribunal."

15 To the extent that there is a definition relevant to the meaning of "dust", this is provided by s 3 of the Act which provides:

> "Dust-related condition means -
>
> (a) A disease specified in Schedule 1; or
>
> (b) Any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust;"

It was common ground that the condition from which the respondent suffered was not one of the diseases specified in Schedule 1. The issue before his Honour was whether the respondent came within subs (b).

16 In relation to subs (b) of the definition, his Honour posed three questions:

(i) Did the plaintiff have a pathological condition of the lungs?

(ii) Was she exposed to dust?

> (iii) If the answer to the first two questions was 'yes', was the plaintiff's condition attributable to the dust to which she was exposed?

17 In the absence of a definition in the Act his Honour relied upon the following dictionary extracts:

> *Macquarie Dictionary*
>
> "(1) Earth or other matter in fine, dry particles.
>
> (2) Any finely powdered substance, as sawdust.
>
> (3) A cloud of finely powdered earth or other matter in the air."
>
> *Concise Oxford Dictionary*
>
> > "(a) Finely powdered earth, dirt etc, lying on the ground or on surfaces and blown about by the wind.
>
> (b) Fine powder of any material (pollen dust; gold-dust).
>
> (c) A cloud of dust."

18 The evidence at trial came from the respondent and two experts, Dr Crank and Dr Markovic. The respondent's evidence was that the cabin of the aircraft became filled with a thick, dense smoke, white-grey in colour, which continued to pour through vents into the cabin for about 20 minutes. It was subsequently established that the smoke was admitted into the cabin as a result of the oil in the auxiliary power unit undergoing a process of pyrolysis (pyrolysis is the thermal decomposition of organic material in oil without combustion).

19 The two experts agreed that if one could look through a microscope or other aid, what one

would have seen in the smoke was ultra-small particles of carbon. Doctor Crank said that the small particles remain suspended in the air for a time and eventually settle on a surface and look like a black, sooty, dark mist. The suspended particles might have moisture in them.

20 On this issue his Honour expressed his conclusion (at Red 117P) as follows:

> "86 Mr Leahy SC's more telling submission, I think, is that if the Act were meant to cover smoke, it would have been a simple thing to include it and he gets support for that submission from the fact that none of the scheduled disease is a disease caused by smoke. This argument has some force especially when it is well understood and must have been known to Parliament when the Act was passed that there are many smoke-caused diseases, lung cancer from smoking perhaps being the most obvious. I do not think this submission should be upheld. In my view, the wording of the relevant sections of the Act encompasses smoke as a dust. In section 3, a dust related condition is relevantly any pathological condition of the lungs attributable to dust. In ordinary common parlance, dust encompasses smoke or ash. Dust may need to be distinguished from gas, fume or vapour. The distinction would be that dust comprises particulate matter. Smoke comprises particulate matter and, accordingly, is more comfortably described as dust rather than gas, fume or vapour. I do not consider that there is a distinction between smoke and dust such that smoke cannot be dust. When the particulate matter settled, it would, to most people, be recognised as dust. If, through the microscope or other aid, one could see the particulate matter without the smoky haze, most people would recognise the particulate matter as dust. The dictionary definitions would encompass smoke as dust."

21 His Honour rejected the submission that a dust needed to be dry to fall within the Act. He did so because dryness was not a component of some of the dictionary definitions of dust and because some of the diseases in Schedule 1 of the Act were capable of being caused by products which were not dry (e.g. Bagassosis and Farmer's Lung - both of which are caused by spores from fungi). His Honour gave other illustrations of diseases in Schedule 1 which could be caused by dusts which were not dry.

22 At Red 119F, his Honour said:

> "90 I do not find the evidence given as to the meaning of the term "dust" to be helpful. Indeed, I do not think it is relevant. The term is not a scientific or technical term. It is an ordinary, common English word and it takes its meaning from the text and context in which it appears in the DDT Act. Evidence from experts that terms such as dust, fume, vapour, mist, gas and smoke have certain meanings is not relevant and I do not consider such evidence in coming to a view about what "dust" means in the DDT Act. What is useful, however, is that the experts describe material that is suspended in the air as aerosol. It may be solid or liquid. It is clear that smoke in the cabin of the aircraft on 4 March 1992 was an aerosol that contained solid matter."

23 His Honour's findings of breach of duty and causation have not been challenged in this appeal.

24 His Honour assessed the plaintiff's entitlement to damages under the WCA as it was before 27 November 2001. The correctness of this basis for assessment depended upon whether his Honour had correctly decided that the joinder of the appellant should take effect from the date on which the statement of claim was filed.

25 In assessing damages for non-economic loss pursuant to s 151G WCA, his Honour took into account that the respondent had been experiencing symptoms for about 17 years and would continue to experience them for the rest of her life (approximately 38 years). His Honour concluded that the respondent's ability to lead a normal life had been significantly impaired. Applying s 151G WCA his Honour found that the respondent's level of disability was 25% of a most extreme case. This produced a figure for damages for non-economic loss of $51,000.

26 In determining the respondent's entitlement to damages for economic loss, it was necessary for his Honour to apply s 151H WCA. That section provided that no damages were to be awarded for economic loss unless the injured worker had received a serious injury. A serious injury was defined as an injury for which damages for non-economic loss of not less than $48,000 were to be awarded.

27 Although his Honour found that the respondent's cough had not prevented her from working as a flight attendant, he concluded that her symptoms would put her at a disadvantage on the open labour market and in that respect she had suffered a loss of earning capacity. In the absence of any evidence as to a precise loss, his Honour calculated the respondent's entitlement to damages for past economic loss and future loss of earning capacity on the basis of a financial buffer, i.e. $10,000 for the past and $25,000 for the future.

28 The damages awarded to the respondent were as follows:

> "Non-economic loss $ 51,000.00
>
> Past loss of earnings $ 10,000.00
>
> Future loss of earnings $ 25,000.00
>
> Past out-of-pocket expenses $ 3,353.96
>
> Future out-of-pocket expense $ 15,000.00
>
> Past Griffiths v Kerkemeyer $ 14,000.00
>
> Future Griffiths v Kerkemeyer $ 20,403.24
>
> Total $138,757.20."

GROUNDS OF APPEAL

Grounds of Appeal 1 – 5 (Amendment Application)

29 Grounds of Appeal 1 – 5 challenged his Honour's conclusion that the amendment making

the appellant a defendant in the proceedings should take effect from 23 November 2001 when the statement of claim was filed. There was no issue that the respondent was entitled to join the appellant to the proceedings. The matter in dispute was the date on which that joinder should take effect.

30 In order to understand the competing submissions, it is necessary to set out the relevant statutory provisions. Sections 64 and 65 CPA provide as follows:

> "64 (1) At any stage of proceedings, the court may order:
>
> (a) that any document in the proceedings be amended, or
>
> (b) that leave be granted to a party to amend any document in the proceedings.
>
> (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.
>
> (3) An order under this section may be made even if the amendment would have the effect of adding or substituting a cause of action that has arisen after the commencement of the proceedings but, in that case, the date of commencement of the proceedings, in relation to that cause of action, is, subject to section 65, taken to be the date on which the amendment is made.
>
> (4) If there has been a mistake in the name of a party, this section applies to the person intended to be made a party as if he or she were a party.
>
> (5) This section does not apply to the amendment of a judgment, order or certificate.
>
> 65(1) This section applies to any proceedings commenced before the expiration of any relevant limitation period for the commencement of the proceedings.
>
> (2) At any time after the expiration of the relevant limitation period, the plaintiff in any such proceedings may, with the leave of the court under section 64 (1) (b), amend the originating process so as:
>
> (a) to enable the plaintiff to maintain the proceedings in a capacity in which he or she has, since the proceedings were commenced, become entitled to bring and maintain the proceedings, or
>
> (b) to correct a mistake in the name of a party to the proceedings, whether or not the effect of the amendment is to substitute a new party, being a mistake that, in the court's opinion, is neither misleading nor such as to

> cause reasonable doubt as to the identity of the person intended to be made a party, or
>
> (c) to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process.
>
> (3) Unless the court otherwise orders, an amendment made under this section is taken to have had effect as from the date on which the proceedings were commenced.
>
> (4) This section does not limit the powers of the court under section 64.
>
> (5) This section has effect despite anything to the contrary in the *Limitation Act* 1969.
>
> (6) In this section, *originating process*, in relation to any proceedings, includes any pleading subsequently filed in the proceedings."

31 Part 6 r 6.24 and Pt 6 r 6.28 of the Uniform Civil Procedure Rules 2005 (UCPR) relevantly provide:

> "6.24(1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party ..."
>
> "6.28 If the court orders that a person be joined as a party, the date of commencement of the proceedings, in relation to that person, is taken to be the date on which the order is made or such later date as the court may specify in the order."

32 Section 17(5) of the Act provides:

> "17(5) If, before the holding of particular proceedings before the Tribunal or at any stage during the holding of any proceedings, the Tribunal is of the opinion that a person ought to be joined as a party to the proceedings, the Tribunal may, by notice in writing served on the person or by oral direction given during the proceedings, join the person as a party to the proceedings."

33 The Dust Diseases Tribunal Rules provide:

> "2(1) Except as otherwise provided by these Rules, the rules of court of the Supreme Court apply to proceedings before the Tribunal and to matters in respect of which the Tribunal has jurisdiction in the same way as they apply to proceedings before the Supreme Court and to

matters in respect of which that Court has jurisdiction.

(2) The rules of court of the Supreme Court apply with necessary modifications and to the extent that they are not inconsistent with the Dust Diseases Tribunal Act 1989."

34 It is also necessary to set out relevant provisions of the *Supreme Court Act* 1970 in order to understand the cases which were cited in support of the competing positions. Supreme Court Rule Pt 8 r 8 provided:

"**Addition of Parties**

8(1) Where a person who is not a party:

(a) Ought to have been joined as a party; or

(b) Is a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon,

the Court, on application by him or by any party or of its own motion, may order that he be added as a party and make orders for the further conduct of the proceedings."

Supreme Court Rule Pt 8 r 11 provided:

"**Further conduct of Proceedings**

11 ...

(3) Where in any proceedings a party is added otherwise than pursuant to an order under rule 10 or part 20 rule 4(3), the date of commencement of the proceedings so far as concerns him shall be:

(a) Where he is added as a defendant – the date on which the amendment adding him as a defendant is made or the date of entry of his appearance or the date of filing his defence whichever is earliest;

(b) Otherwise – the date on which the amendment adding him as a party is made."

Supreme Court Rule Pt 20 r 1 provided:

"**General**

(1) The Court may, at any stage of any proceedings, on application by any party or of its motion, order that any document in the proceedings be amended, or that any party have leave to amend any document in the proceedings, in either case in such manner as the Court thinks fit.

(2) All necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, or of correcting any defect or error in any proceedings, or of avoiding multiplicity of proceedings.

(3) Where there has been a mistake in the name of a party, sub-rule (1) applies to the person intended to be made a party as if he were a party.

(3A) An order may be made, or leave may be granted, under sub-rule (1) notwithstanding that the effect of the amendment is, or would be, to add or substitute a cause of action arising after the commencement of the proceedings, but in such a case the date of commencement of proceedings, so far as concerns that cause of action, shall, subject to rule (4), be the date on which the amendment is made.

..."

Supreme Court Rule Pt 20 r 4 provided:

"**Statutes of Limitation**

4(1) Where any relevant period of limitation expires after the date of filing of a statement of claim and after that expiry an application is made under rule 1 for leave to amend the statement of claim by making the amendment mentioned in any of sub-rules (2), (3), (4) and (5), the Court may in the circumstances mentioned in that sub-rule make an order giving leave accordingly, notwithstanding that that period has expired.

...

(3) Where there has been a mistake in the name of a party and the Court is satisfied that the mistake was not misleading nor such as to cause reasonable doubt as to the identity of the person intended to be made a party, the Court may make an order for leave to make an amendment to correct the mistake, whether or not the effect of the amendment is to substitute a new party.

(4) Where, on or after the date of filing a statement of claim, the plaintiff is or becomes entitled to sue in any capacity, the Court may order that the plaintiff have leave to make an amendment having the effect that he sues in that capacity.

(5) Where a plaintiff, in his statement of claim, makes a claim for relief on a cause of action arising out of any facts, the Court may order that he have leave to make an amendment having the effect of adding or substituting a new cause of action arising out of the same or substantially the same facts and a claim for relief on that new cause of action.

> (5A) An amendment made pursuant to an order made under this rule shall, unless the Court otherwise orders, relate back to the date of filing the statement of claim.
>
> ..."

35 The appellant submitted that the decision by his Honour as to what legislation or rules applied to the amendment of the statement of claim sought by the respondent and the decision as to the date on which such an amendment should take effect, were decisions of the Tribunal in point of law. That being so, the appellant submitted that it was entitled pursuant to s 32 of the Act to bring an appeal in relation to those matters. I do not understand the respondent to challenge that proposition.

36 His Honour's attention was not drawn to any provisions of the Act. Specifically, his Honour's attention was not drawn to s 17(5) of the Act. At trial and on appeal the matter proceeded on the basis that the relevant source of power to make the amendment was to be found in either the CPA or the UCPR.

37 At trial the appellant submitted that the correct characterisation of the respondent's application to amend was the addition of a party and that Pt 6 r 6.24 and r 6.28 UCPR applied. The respondent submitted that either

s 64 or 65 CPA applied in that what had occurred was a mistake in the name of a party and that what she was doing was to substitute the correct party. The respondent relied upon the broad interpretation of the concept of a "mistake in the name of a party" by McHugh J in *Bridge Shipping Pty Limited v Grand Shipping SA* (1991) 173 CLR 231 at 260-261.

38 His Honour concluded that s 65 CPA did not apply. He reached this conclusion on the basis that there was not any relevant limitation period (see s 12A of the Act), if there were a limitation period the proceedings had not been brought before its expiration and in any event, the amendments to the workers compensation legislation in late 2001 did not impose any "limitation period" nor could they be regarded as constituting a limitation period "for the commencement of proceedings". Neither the appellant nor the respondent contended that his Honour was in error in disregarding s 65 CPA.

39 His Honour's reasoning was as follows: the correct characterisation of the respondent's application was that there had been a mistake in the name of a party and that the application was to substitute a party, rather than to add one. In respect of the period from 1990 to 30 October 1993 the appellant was to be substituted for Ansett. His Honour found that it had always been the respondent's intention to bring proceedings against her employer for that period and that she had simply been mistaken as to the name of her employer for that period.

40 On the basis that the respondent had made a mistake in the name of a party, his Honour found that Pt 6 r 6.24 and r 6.28 UCPR did not apply. This was because those rules applied to the joinder of an additional party not to the substitution of a party where a mistake had been made as to the name of that party. Although s 64 CPA did not specify when an amendment made pursuant to its provisions should take effect, his Honour applied the general principle that amendments operate from the date of the original pleading. This was particularly so when an amendment was made as a result of a mistake in the name of a party.

41 The submissions before this Court raised the same issues. The appellant did not challenge the finding that there had been a mistake by the respondent in the name of a party and that when the statement of claim had been filed, the respondent had intended to bring proceedings against her employer from 1990 until 30 October 1993.

42 The Courts have had occasion to consider the words "mistake in the name of a party". *Evans Constructions Co Limited v Charrington & Co Limited* [1983] QB 810 concerned proceedings in which Charrington & Co had been wrongly sued in the mistaken belief that it was the plaintiff's landlord. The plaintiff's application to substitute the true landlord succeeded despite the expiry of the relevant time bar. At p 821 Donaldson LJ said:

> "In applying Ord 20 r 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matter complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances."

43 That interpretation was followed by Clarke J in *Lloyd Steel Co (Aust) Pty Limited and Anor v Jade Shipping SA and Anor* (1985) 1 NSWLR 212. That was a case involving the application of Pt 20 r 4(3). The case involved a mistake in the name of a party in that proceedings were commenced against a defendant in the mistaken belief that it was the carrier in relation to a Bill of Lading. When the mistake in the identity of the carrier was discovered, a limitation period had expired. In applying Pt 20 r 4(3), his Honour said of the *Evans Constructions* case at 218:

> "It may be that the actual decision does not bind me in view of textual differences in the rules but whether or not it does I am attracted the majority decision and propose to apply it here. I would add that the later reference in the rule to identity supports the view that the rule is not limited to those cases where there is a mere misdescription of a particular entity but extends to cover cases where the party intended to be sued is wrongly identified."

44 The approach in those cases was approved by McHugh J (with whom the majority agreed) in *Bridge Shipping*. *Bridge Shipping* was dealing with O 36 of the Victorian Supreme Court Rules. The relevant rules, namely r 36.01(4), r 36.01(5) and r 36.01(6), were similar to the New South Wales Pt 20 r 4(3) and the English O 20 r 5(3).

45 The wording in each set of rules is different, but the interpretation in *Bridge Shipping* is clearly applicable to subsection 64(4) CPA. At p 259 – 261 McHugh J said:

> "The concluding words of sub-r. (4) "whether or not the effect is to
>
> substitute another person as a party" enable a plaintiff to substitute one person for another person as a party to the action. Those words

> also imply that the fact that the plaintiff intended to sue the person who was sued does not prevent the sub-rule applying provided that there was a mistake in the name of the person sued. Moreover, a plaintiff may make "a mistake in the name of a party" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name. Thus, a plaintiff may make a mistake "in the name of a party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, eg the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person but is mistaken as to the name of that person. In the first case, the properties which identify the person are personal characteristics; in the second case, they are the properties which are of the essence of the description of that person. But for the purpose of sub-r. (4) that distinction is irrelevant. In both cases, the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating sub-r. (4) as dealing only with the case where the properties which identify the party are inherent properties. That is, there is no warrant for treating sub-r. (4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X". The sub-rule applies equally to the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed was X". In both cases, a mistake in the name of the party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else.
>
> Rule 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit. It should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases whether the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description. In my opinion, *Evans v Charrington* and *Lloyd Steel* were correctly decided."

46 Applying that statement of principle, it seems clear that subsection 64(4) CPA is engaged. There was a mistake in the name of a party as his Honour found and that finding has not been

challenged by the appellant. It was a finding of fact. The question then becomes what is the effect of applying subsection 64(4)?

47 The appellant while not conceding the application of subsection 64(4) CPA, submitted that if it did apply it was part of a general amendment provision which should give way to a provision specifically directed to the power which the Court was being asked to exercise. Looked at in that way, the appellant submitted that the correct characterisation was not the substitution of one party for another, but the addition or joinder of a party.

48 The appellant submitted that if the correct characterisation of the Court's exercise of power was that it involved the joinder of an additional party, then the analysis of McColl JA at [43 – 46] and [81 – 83] and of Brereton J at [143 – 159] in *Amaca v Cremer (as Executor of the Estate of the late Winifred Cremer)* [2006] NSWCA 164; (2006) 66 NSWLR 400 made it clear that the applicable rule is the equivalent of Supreme Court Rule Pt 8 r 11, i.e. UCPR Pt 6 r 6.24 and r 6.28. Rule 6.28 provides that the date of the commencement of the proceedings in relation to the person so joined is to be the date on which the order is made. In this case that was 27 August 2007.

49 The appellant submitted that by reference to the reasoning of Brereton J in *Amaca v Cremer* and of Gleeson CJ in *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 721, a provision such as 64 CPA which deals with amendments generally should give way to a provision which is directed to the specific form of amendment under consideration. The appellant submitted that in this case the amendment was the joinder of a new party in the proceedings (*Amaca v Cremer* at [145 – 146]); and that UCPR Pt 6 r 6.24 and r 6.28 dealt specifically with such a joinder. The appellant submitted that his Honour had applied the wrong provision in making the amendment sought by the respondent and that the joinder of the appellant should have taken effect from 27 August 2007 and not 23 November 2001.

50 The respondent submitted that the appellant had misunderstood the operation of subsection 64(4) CPA. She submitted that the effect of the order sought was not the substitution of the appellant for Ansett, but the correction of a mistake which had been made. The mistake which had been made was in the name of a party. The respondent submitted that the appellant had failed to give effect to the words "as if" in subsection 64(4). Those words implied that the party in respect of whom the order was sought, had been there all the time but had not been properly named or described. She submitted that the subsection contemplated a mistaken party which had not been properly identified by name. The respondent submitted that her reliance upon subsection 64(4) did not involve the exercise of a general power of amendment, but the remediation of a mistake to which the subsection was specifically directed.

51 The Court is of the view that the submissions of the respondent should be accepted and that his Honour did not fall into error in applying subsection 64(4) when making the amendment sought by the respondent. There was, as s 64 envisages, an amendment to a document, i.e. the statement of claim, but that amendment was made to reflect the statutory direction that where a mistake in the name of a party has occurred "this section applies to the person intended to be made a party as if he or she were a party".

52 This approach to the words "as if" is supported by other cases where that form of words has been used. *East End Dwellings Co Limited v Finsbury Borough Council* [1952] AC 109 at 132 was such a case. Lord Asquith said the following about a resumption of land provision which provided that the value of an interest for the purposes of assessment of compensation, should

be taken to be the value which it would have if the whole of the war damage had been made good before the resumption. His Lordship said:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

53 Similarly, in the *Union Fidelity Trustee Company of Australia Ltd v The Commissioner of Taxation* [1969] HCA 36; (1969) 119 CLR 177 at 187 Kitto J said:

> "In the light of the definition of "taxpayer" the expression "calculated under this Act as if the trustee were a taxpayer in respect of that income" may be expanded to read "calculated under this Act as if the trustee were a person deriving that income". But the "as if" shows beyond question that the basis of the calculation is to be a hypothesis different from the actual fact."

54 In contrast there are a number of difficulties with the approach sought to be applied by the appellant. Firstly, the effect of its submission is that a statutory enactment (s 64(4)) would give way to subordinate legislation enacted pursuant to a delegated rule making power, i.e. Pt 6 r 6.28.

55 Next, the submission that, if the effect of the respondent's amendment was to join or add an additional party, Pt 6 r 6.28 must apply to the exclusion of any other rule or section of an act, fails to take account of the legislative scheme which includes both the *Civil Procedure Act* and the Uniform Civil Procedure Rules. As *Bridge Shipping* made clear, provisions dealing with mistakes in the name of a party are remedial in nature and should be given "the widest interpretation which its language will permit": It is inconsistent with such a scheme to give pre-eminent force to a rule such as Pt 6 r 6.28 in a situation where an amendment which comes fairly and squarely under such remedial legislation might also be characterised as the addition or joinder of a party.

56 Finally such an interpretation could produce an arbitrary result and would be contrary to the intention that "all necessary amendments are to be made for the purpose of determining the real questions raised by the ... proceedings, correcting any ... error in the proceedings ..." (s 64(2) CPA).

57 The appellant accepted that if the respondent's application had been to substitute the appellant for Ansett so that Ansett no longer remained in the proceedings, their submission would be unavailable. The appellant also accepted (leaving aside limitation considerations) that its submission would still be available even if the claim against Ansett for the period 1990-1993 was based in tort, and for the period 1993-1998 was based in contract, and if the respondent had made a mistake in the name of Ansett in respect of the period giving rise to the claim in tort. Arbitrary results such as this are usually indicative of error in interpretation, especially in a body of legislation intended for the just, quick, cheap and non-capricious resolution of civil disputes.

58 The appellant accepted that if s 64(4) CPA applied to the respondent's application to amend, the amendment should take effect from the date of filing of the statement of claim, i.e. 23

November 2001. That concession was properly made. A proper reading of s 64 CPA giving full effect to the words "as if", makes it clear that an amendment under s 64(4) should take effect from that date. This is to be contrasted with the special provision in s 64(3).

Grounds of Appeal 1 – 5 (Jurisdiction)

59 The appellant submitted that in the context of the Act the concepts of "dust" and "smoke" were mutually exclusive. It submitted that the failure of the Act to refer to "smoke" in the context of a dust-related condition and the absence of any mention of "smoke" in Second Reading Speeches relating to the Act, meant that implicitly the Act intended that the concept of "smoke" should not be included in the meaning of "dust". It submitted that if it had been intended for the meaning of "dust" to include "smoke", it would have been an easy matter for the Act to have made some reference to "smoke".

60 The appellant submitted that the word "dust" as used in the Act should not be given its ordinary meaning. It submitted that the meaning to be given to the word "dust" was to be qualified by the overall context of the Act and by its purpose as indicated in the Second Reading Speeches, i.e. the word "dust" was not to include smoke.

61 We do not agree. "Dust" is not defined in the Act. The only definition which provides guidance is that of a "dust-related condition" which is expressed in wide and unqualified terms. There is nothing in the wording of the Act which would impose the qualification sought by the appellant. In those circumstances his Honour was entitled to give to the word "dust" its ordinary meaning.

62 In relation to the appellant's first submission, His Honour did not find that, as a matter of general principle, "smoke" was a "dust" within the meaning of the Act. What he found was that the specific smoke to which the respondent was exposed contained small particles of particulate matter which would settle after being suspended in air and which could be correctly described as "dust". This was not a decision as to a point of law but a factual determination. There was ample evidence before his Honour to justify that conclusion.

63 The question can be looked at in another way. These grounds of appeal turn on whether the respondent was exposed to "dust" when the thick smoke entered the cabin of the BAE 146 aircraft on 4 March 1992. Unless the respondent was exposed to "dust" so as to develop a dust-related condition the Tribunal did not have jurisdiction to hear the matter. In *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7 Mason J said:

> "Many authorities can be found to sustain the proposition that the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law."

64 His Honour then qualified that general statement of principle as follows:

> "However, special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts as found fall within these words. *Brutus v Cozens* was just such a case. The only question raised was whether the appellant's behaviour was "insulting". As it was not unreasonable to hold that his behaviour was

> insulting, the question was one of fact."

65 A similar statement of principle was made by Basten JA in *Bondi Beach Astra Retirement Village Pty Limited v Hohman* [2010] NSWCA 38 at [28] where his Honour said:

> "... The generally accepted proposition is that the meaning of an ordinary English word is not a question of law and that an error of law will arise only in the circumstances of application of the definition to the facts, where it can be said that the facts necessarily fall within or without the statutory term and the fact-finder has held otherwise: See the authorities identified in *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138; 166 LGERA 379 at [204]."

66 The distinction was described by Kitto J in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512 as follows:

> "The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the appellant's operations fall within the ordinary meaning of the words as so determined; and that is a question of law ...If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact."

The issue before his Honour in that case was whether certain operations answered the description "mining operations upon a mining property" within the meaning of s 122 of the *Income Tax Assessment Act* 1936.

67 Applying those statements of principle to these grounds of appeal, it is clear that what is being challenged is not his Honour's determination that on the material before him different conclusions could be arrived at as to whether or not the smoke to which the respondent was exposed was a "dust", but rather his factual conclusion that this smoke did constitute "dust". That being so, what is being challenged is not a decision in point of law but a factual finding by his Honour. These grounds of appeal have not been made out.

68 The controversy before the Court was in the form of an appeal under the Act, s 32(1) not an application under the *Supreme Court Act 1970* (NSW), s 69. Having said that, were the Court called upon to decide the same question as a jurisdictional fact, no error is perceptible in the approach of the learned primary judge.

Grounds of Appeal 6 – 11 (Damages)

69 The sections under consideration in these grounds of appeal are 151G and 151H WCA as they were before the amendments which came into effect on 27 November 2001.

70 Before those amendments, a plaintiff could not recover damages for non-economic loss under s 151G unless those damages were assessed to be greater than a specified proportion of the amount to be awarded for a most extreme case. The appellant's complaint was that his Honour's finding that the respondent's entitlement to such damages equated to 25 percent of a most extreme case was so beyond a proper exercise of his Honour's discretion as to amount to an error of law.

71 In the course of argument the appellant accepted that there was evidence before his Honour which established an entitlement to some non-economic loss. The appellant's complaint was what it described as the complete lack of proportionality between his Honour's finding and the evidence.

72 This statement of the appellant's submission reveals its inherent fallacy. Once one talks of a lack of proportionality or an insufficiency of evidence, one is inevitably dealing with issues of fact and not law.

73 There was ample evidence before his Honour upon which his Honour was able to base his 25 percent assessment. Assessments of this kind of their nature, involve the exercise of discretion and involve findings of fact. Since the appellant's challenge is to a factual finding by his Honour, not to a decision in point of law, the challenge to his Honour's application of s 151G WCA has not been made out.

74 The appellant's challenge to his Honour's application of s 151H WCA depended upon it being successful in its challenge in respect of s 151G. This was because damages for economic loss under s 151H depended upon a finding that a plaintiff had received a "serious injury" which was defined as an injury in respect of which damages greater than $48,000 under s 151G had been awarded. His Honour's assessment of the respondent's entitlement to non-economic loss at 25 percent of a most extreme case satisfied that definition.

75 Since the appellant's challenge to his Honour's application of s 151G has not been made out, the challenge to his Honour's application of s 151H also fails.

76 In relation to the appellant's submissions as to damages generally, the observations of Glass JA in *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 155G – 156A remain apposite:

> "To say of a finding that it is perverse, that it is contrary to the overwhelming weight of the evidence, that it is against the evidence and the weight of the evidence, that it ignores the probative force of the evidence which is all one way or that no reasonable person could have made it, is to say the same thing in different ways. Upon proof that the finding of a jury is vitiated in this way, it will be set aside because it is wrong in fact. Since the Act does not allow this Court to correct errors of fact, any argument that the finding of a Workers Compensation Commission Judge is vitiated in the same way discloses no error of law and will not constitute a valid ground of appeal. It is also pointless to submit that the reasoning by which the Court arrived at the finding of fact was demonstrably unsound as this would not amount to an error of law: *R v District Court of the Metropolitan District Holden at Sydney: Ex parte White* [1966] HCA 69; (1966) 116 CLR 644 at 654."

Grounds of Appeal 12 and 13 (Failure to Mitigate)

77 Section 151L WCA provides that in assessing damages the Court must consider the steps that have been taken and that could reasonably have been taken by the injured worker to mitigate his or her damages. The appellant submitted that his Honour had failed to have regard

to that section in that he had not specifically referred to it in his judgment and had failed to take into account the respondent's capacity to work at her old job and at other jobs, when assessing past and future economic loss.

78 It is true that his Honour did not specifically refer to s 151L WCA. Nevertheless, he specifically took into account questions of mitigation when considering economic loss and referred in detail to the respondent's capacity for work and to her applications for employment. (Red 147 – 148) In those circumstances, there was no error of law in his Honour failing to specifically refer to s 151L in circumstances where he gave effect to that section.

The amendment application on 11 March 2010

79 On 11 March 2010, the appellant sought to amend its notice of appeal by adding grounds that the learned primary judge erred in point of law by failing to consider and apply the relevant provisions of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (the CA (CL) Act) and failing to enter a verdict compelled by that Act.

80 The Court had some time earlier raised with the parties the possibility of the CA (CL) Act applying through its application to interstate commercial flights: see generally CA (CL) Act, Parts I and IV. Central to the possible application of the CA (CL) Act was the question whether the respondent, as an employee, not on duty, but in the course of employment, could be a "passenger" for the purposes of the operation of the CA (CL) Act and the underlying international conventions. That is an important, but not straightforward question.

81 There are a number of legal aspects to the above question which would involve consideration of foreign decisions on the underlying international conventions. Importantly, however, factual material was said by the respondent to be relevant to those questions. The primary judge did not receive evidence relevant to those matters or make findings in regard to such evidence. He did not do so because the parties were unaware of the possible application of the CA (CL) Act.

82 In these circumstances, in an appeal under the Act, s 32(1) the appellant faced insurmountable difficulties in demonstrating that there was a **decision** in point of law which was in error.

83 The appellant's primary contention was that the matter should be remitted to the Tribunal to deal with the CA (CL) Act. That course could only be founded on a view that the primary judge made an implicit decision in point of law not to deal with an issue not put to him by the parties. We reject that. That is not an appeal from a decision in point of law: see generally *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 and *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187. Nor could it be said that there had been any error of law in the primary judge not dealing with an issue, not raised, which might or might not be found in favour of the appellant.

84 The appellant also submitted that the point could, however, be decided without further evidence and in a way which could not be affected by further evidence. Nevertheless, the appellant's argument still suffered from an absence of a decision in point of law. The amendment was bound to fail.

85 The respondent also raised discretionary considerations based on the late application and

the need, at least as far as she was concerned, for a further hearing. If we had been persuaded that no further evidence could possibly affect the conclusion that the CA (CL) Act applied and an appeal was available, the lateness of the raising of the matter would not have been determinative.

86 For these reasons, we refused leave to amend the notice of appeal.

87 No application was made under the *Supreme Court Act*, s 69.

Conclusion

88 It follows from the above that the appellant's challenge to his Honour's judgment has not been made out. Accordingly, the orders of the Court are as follows:

(1) Appeal dismissed.

(2) The appellant is to pay the costs of the motion to amend its grounds of appeal and of this appeal.

****

LAST UPDATED:
1 April 2010

Supreme Court of New South Wales - Court of Appeal

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East West Airlines Limited v Turner (No 2) [2010] NSWCA 159 (9 July 2010)

Last Updated: 9 July 2010

NEW SOUTH WALES COURT OF APPEAL

CITATION:
East West Airlines Limited v Turner (No 2) [2010] NSWCA 159

FILE NUMBER(S):
2009/00298331

HEARING DATE(S):
28 June 2010

JUDGMENT DATE:
9 July 2010

PARTIES:
East West Airlines Limited - Appellant
Joanne Turner - Respondent

JUDGMENT OF:
Allsop P Handley AJA Hoeben J

LOWER COURT JURISDICTION:
District Court

LOWER COURT FILE NUMBER(S):
DDT 428/01

LOWER COURT JUDICIAL OFFICER:
Kearns J

LOWER COURT DATE OF DECISION:
5 May 2009

COUNSEL:
J Turnbull - Appellant
DRJ Toomey - Respondent

SOLICITORS:
Curwoods lawyers - Appellant
Turner Freeman Lawyers - Respondent

CATCHWORDS:
COSTS - indemnity costs - Calderbank offer to compromise appeal - offer rejected by unsuccessful appellant - whether rejection of offer unreasonable - whether an entitlement to some costs on an indemnity basis because certain grounds of appeal had no prospects of success - whether discretion to award indemnity costs should be exercised.

LEGISLATION CITED:
Dust Diseases Tribunal Act 1989
Uniform Civil Procedure Act 2005
Uniform Civil Procedure Rules

CATEGORY:
Consequential orders

CASES CITED:
Calderbank v Calderbank [1976] FAM 93
Dean v Stockland Property Management Limited & Anor (No 2) [2010] NSWCA 141
East West Airlines Ltd v Turner [2010] NSWCA 53
Fountain Selected Meats (Sales) Pty Limited v International Produce Merchants Pty Limited [1988] FCA 202; (1988) 81 ALR 397
Jones v Bradley (No 2) [2003] NSWCA 258
Re: Bond Corp Holdings Limited (1990) 1 WAR 465 at 478; (1990) 1 ACSR 350
SMEC Testing Services Pty Limited v Campbelltown City Council [2000] NSWCA 323

TEXTS CITED:

DECISION:
The respondent's application for indemnity costs is refused.
The respondent to pay the appellant’s costs of the costs application.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES
COURT OF APPEAL

2009/298331

DDT 428/2001

ALLSOP P

HANDLEY AJA

HOEBEN J

Friday 9 July 2010

EAST WEST AIRLINES LTD v Joanne TURNER (No 2)

JUDGMENT

1 THE COURT: Judgment in the appeal was given on 1 April 2010 (*East West Airlines Ltd v Turner* [2010] NSWCA 53). The successful respondent applied for a special order in relation to the costs of the appeal, i.e. that she have an order for indemnity costs of the appeal from 29 June 2009 confined to grounds 1 – 11 of the Second Further Amended Notice of Appeal. Written submissions were directed and received.

The Appeal

2 The respondent brought proceedings in the Dust Diseases Tribunal. She suffered injuries in March 1992 when working for the appellant as a flight attendant. She developed a persistent cough as a result of inhaling smoke, which entered the cabin of an aircraft in which she was travelling. The trial judge found that she was thereby exposed to dust, which caused her to develop her cough.

3 Under s 32 of the *Dust Diseases Tribunal Act 1989* (the Act) an appeal is restricted to a party "who is dissatisfied with a decision of the Tribunal in point of law ...". The substantial issues raised by the appellant were the jurisdiction of the Tribunal to hear the claim in that it argued that the smoke to which the respondent was exposed was not a dust and a practice issue as to when an amendment to the Statement of Claim took effect.

4 The Court dismissed the appeal. We held that in the circumstances of this case, the trial judge's decision that the smoke to which the respondent was exposed was a dust was open to him and involved a question of fact not law. We also upheld the trial judge's decision as to the date on which the amendment to the Statement of Claim took effect. The other issues in the appeal were dismissed largely, but not only, on the basis that they raised factual questions.

Factual Background

5 The decision of the Tribunal was given on 5 May 2009. On 16 June 2009 the appellant filed a Notice of Appeal. In order to understand the nature of the dispute it is necessary to briefly set out the correspondence which thereafter passed between the parties.

29 June 2009 – letter from respondent's solicitors inviting appellant to withdraw 21 of the 29

grounds of appeal on the basis that they raised issues of fact not law.

29 July 2009 – respondent served motion to dismiss as incompetent the 21 grounds of appeal referred to in the letter of 29 June 2009.

4 August 2009 – Amended Notice of Appeal served. It deleted 16 of the 21 grounds of appeal referred to in the letter of 29 June 2009.

6 August 2009 – Directions Hearing. Notice of Motion stood over while solicitors for respondent considered the Amended Notice of Appeal.

14 September 2009 – Respondent's solicitors sent letter proposing settlement of the appeal.

6 The letter was headed "Without Prejudice Save as to Costs". It was in the following terms:

> "We refer to previous correspondence.
>
> Our client has already incurred considerable expense in relation to your Notice of Appeal, including the filing of a Notice of Motion that resulted in your client filing an Amended Notice of Appeal and attending on Directions Hearings in the Court of Appeal.
>
> Our client maintains its position set out in our letter of 29 June 2009 that many of the grounds of appeal relate to findings of fact and are therefore incompetent. While some of the grounds of appeal have been withdrawn by way of the Amended Notice of Appeal, a large number of the remaining grounds of appeal continue to attempt to appeal findings of fact.
>
> In an attempt to avoid further costs being incurred by our client we are instructed to put an offer of settlement in relation to the appeal on the basis that the appeal be withdrawn with each party to bear their own costs.
>
> Orders have now been made by the Court in relation to the preparation of submissions. Further costs will be incurred. Given this, the above offer is open for a period of fourteen days. If the offer is not accepted and your client is not successful in its appeal, then our client will rely upon this letter in an application for indemnity costs from the date of this letter."

7 The following correspondence then passed between the parties:

16 September 2009 – Appellant sought an estimate of the respondent's costs and disbursements in the appeal to date.

2 October 2009 – Respondent provided estimate of its costs and counsel's fees at $7,475.

15 October 2009 – Further Amended Notice of Appeal served. This deleted a further ground of appeal referred to in the letter of 29 June 2009 but added six additional grounds.

16 October 2009 – Appellant's submissions served.

6 November 2009 – Respondent's submissions served.

17 November 2009 – Respondent's offer (letter 14 September 2009) rejected by appellant.

23 December 2009 – Second Further Amended Notice of Appeal filed and served. It deleted a further six grounds of appeal. The appeal proceeded on the basis of this document.

Submissions

8 The respondent submitted that grounds 1 – 11 of the Second Further Amended Notice of Appeal raised questions of fact not of law. She submitted that the appellant had been put on notice by the letter of 29 June 2009 that such was the case yet it had persisted with those or similar grounds which ultimately (and the respondent says inevitably) were dismissed. In the circumstances of this case the respondent submitted that the appellant should have known that there was no real prospect of success in respect of those grounds of appeal. In those circumstances, she submitted that she should have her costs of that part of the appeal on an indemnity basis.

9 As an alternative, the respondent relied upon the letter of 14 September 2009. Although this letter was not in terms expressed to be made in accordance with *Calderbank v Calderbank* [1976] FAM 93 the respondent submitted that it had that effect. It submitted that there was a real element of compromise in the offer and that it was unreasonable in the circumstances for the appellant to reject it. The unreasonableness arose from the appellant's failure to recognise that these grounds of appeal, for the reasons set out in the letter, raised issues of fact not law. Accordingly, the respondent submitted, that she should have her costs on an indemnity basis in respect of those grounds of appeal which raised issues of fact, i.e. grounds 1 –11.

10 In relation to the letter of 14 September 2009, the appellant did not dispute that it operated as a *Calderbank* offer, nor did it dispute that it contained a real element of compromise. The appellant challenged its effectiveness, however, on the basis that in terms it referred to the grounds of appeal challenged in the letter of 29 June 2009 most of which had by that time already been removed by the Amended Notice of Appeal. The appellant submitted that there were such significant differences between the Second Further Amended Notice of Appeal and the original Notice of Appeal that the reliance by the respondent in its offer on the letter of 29 June 2009 was largely irrelevant in the context of the issues which were actually argued in the appeal.

11 The appellant also submitted that the offer of 14 September 2009 made no reference to the practice issue which was significant in the appeal and which if it had been decided in favour of the appellant, would have led to its complete success. The appellant submitted that it was common ground that the practice issue raised questions of law.

12 In answer to the respondent's submission that the appellant had no prospects of success in relation to those grounds of appeal which were ultimately held to raise issues of fact, the appellant submitted that if that were so, the respondent could and should have pursued the option of striking out those parts of the Second Further Amended Notice of Appeal which she said fell into that category. It submitted that the respondent's failure to do so was an implicit acceptance that these grounds were arguable.

Consideration

13 This Court has held on a number of occasions that a *Calderbank* offer does not trigger an automatic order for indemnity of costs. The correct approach to such offers is:

> "The making of an offer of compromise in the form of a Calderbank letter ... where the offeree does not accept the offer but ends up worse off than if the offer had been accepted, is a matter to which the Court may have regard when deciding whether to otherwise order, but it does not automatically bring a different order as to costs. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure. (*SMEC Testing Services Pty Limited v Campbelltown City Council* [2000] NSWCA 323 Giles JA at [37]).

14 This statement of principle was unanimously approved in *Jones v Bradley (No 2)* [2003] NSWCA 258 at [8 - 9].

15 The question for the Court is whether in the particular circumstances of this appeal, it was unreasonable for the appellant to refuse the offer. We have concluded that it was not unreasonable. The offer required the appellant to withdraw the whole of the appeal. The appeal raised an important practice issue in relation to amendments made under the *Uniform Civil Procedure Act* 2005 and under the *Uniform Civil Procedure Rules*. The particular issue had not previously been decided. There were persuasive arguments which supported the submissions of both parties on the issue.

16 Moreover, as the appellant submitted, the final form of the Second Further Amended Notice of Appeal was significantly different to that referred to in the letter of 24 June 2009 and in the offer. The final form of the Notice of Appeal was not susceptible to the criticisms made by the respondent of the first Notice.

17 In the exercise of its general discretion the Court can award costs on an indemnity basis if it appears that proceedings have been commenced or continued in circumstances where a party should have known that there was no real prospect of success (*Fountain Selected Meats (Sales) Pty Limited v International Produce Merchants Pty Limited* [1988] FCA 202; (1988) 81 ALR 397 at 400 – 1; *Re: Bond Corp Holdings Limited* (1990) 1 WAR 465 at 478; (1990) 1 ACSR 350 at 363-4). This applies to a party pursuing an appeal.

18 However, as was said in *Dean v Stockland Property Management Limited & Anor (No 2)* [2010] NSWCA 141 at [43]:

> "Care must be taken, however, lest parties be unduly deterred from bringing or defending proceedings for fear that they will retrospectively be found to have not been justified in doing so. Uncertainty in outcome is not

> enough, and what appears certain at the time of judgment does not necessarily have that character at an earlier time."

19 It is true that Grounds of Appeal 1 – 11 were dismissed substantially on the basis that they raised issues of fact. There was, however, scope for argument to the contrary. This was particularly so when there was an earlier decision of the Dust Diseases Tribunal which held that smoke was not a dust (*Stelzer v WD & HO Wills (Australia) Limited*, Maguire J, 24.2.1995). It follows that we do not think that on a proper appreciation of the circumstances of this appeal, the appellant's submissions in respect of Grounds of Appeal 1 – 11 were so untenable that indemnity costs should be ordered. Ultimately the appellant's submissions did not carry the day but there was an arguable basis for supporting its position.

20 We decline to vary the costs order previously made. The respondent's application for indemnity costs is refused and the respondent should pay the appellant's costs of the costs application.

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LAST UPDATED:
9 July 2010

High Court of Australia Transcripts

East West Airlines Ltd v Turner [2010] HCATrans 238 (3 September 2010)

Last Updated: 8 September 2010

[2010] HCATrans 238

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney No S105 of 2010

B e t w e e n -

EAST WEST AIRLINES LTD

Applicant

and

JOANNE TURNER

Respondent

Application for special leave to appeal

GUMMOW J
KIEFEL J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 3 SEPTEMBER 2010, AT 2.23 PM

MR D.F. JACKSON, QC: If the Court pleases, I appear with my learned friend, **MR J.B. TURNBULL**, for the applicant. (instructed by Curwoods Lawyers)

MR B.W. WALKER, SC: May it please the Court, I appear with my learned friend, **MR J.A. McINTYRE, SC**, for the respondent. (instructed by Turner Freeman Lawyers)

GUMMOW J: Yes, Mr Jackson.

MR JACKSON: Your Honour, this is a case, in our submission, of on the one hand great simplicity and on the other hand great importance. The issue is important because the Dust Diseases Tribunal of New South Wales has jurisdiction and a jurisdiction which is exclusive if the plaintiff's condition is a dust-related condition, but only if that is the case. The issue in that regard is whether oil smoke caused by pyrolysis of engine oil is dust in terms of the *Dust Diseases Tribunal Act*.

Your Honours, we have set out the legislative provisions in our written submissions at page 143, and a copy of the Act itself is the first document in our attached materials. You will see in paragraph 7 the jurisdiction of the Tribunal is provided for by section 10(1). It has:

exclusive jurisdiction to hear and determine proceedings referred to in section 11 –

Section 11 is then set out:

(a) a person is suffering, or has suffered, from a dust-related condition –

Your Honours will see the remainder of that provision at the top of the next page. The term "dust-related condition" is a matter upon which jurisdiction is dependent. You will see "dust-related condition", the definition, referred to in paragraph 10. There are some specific conditions referred to in Schedule 1 which is set out in paragraph 11. None of those is applicable. The question was then whether the condition was a pathological condition that was attributable to dust. It was not in dispute that the condition was a pathological condition of the lungs pleura or peritoneum and the question was whether it was dust.

That term is not defined in the *Dust Diseases Tribunal Act* and your Honours will have seen that the primary judge held that the smoke which she ingested was a result of oil in the auxiliary power unit of the aircraft, when she was a passenger, undergoing a process of pyrolysis. Could I say, your Honours, if I can pause at that point, the decision goes a very long way to expand, in our submission, the jurisdiction of the Tribunal. We refer to some matters in support of that in paragraph 31 of page 148 of the application book.

Your Honours, there are significant advantages for a plaintiff in instituting proceedings in the Dust Diseases Tribunal because of the matters to which we refer in paragraph 32, no time limit. No damages for pain and suffering can be awarded, notwithstanding the death of the plaintiff, and the other matters that are referred to in paragraph 32. Your Honours, the Court of Appeal took the view that no appeal lay to it because it treated the issue as being one of fact. You will see that referred to at page 107 in paragraph 2 where the appeal provision is set out, a party is dissatisfied with a decision in point of law.

Then, your Honours, the application of that at page 129, paragraph 67, what was said was that it was clear that what was being challenged was not a determination, that different conclusions could be arrived at as to whether or not the smoke was dust but, rather, the factual conclusion that it did constitute dust and that was not a question of law. Now, your Honour, a factual finding it might be, but the issue with which the Court of Appeal was concerned is one which was jurisdictional. Did the Dust Diseases Tribunal have jurisdiction? It would only have jurisdiction if the substance was a dust.

GUMMOW J: Was there an objection to the competency of the appeal?

MR JACKSON: To the competency of the appeal?

GUMMOW J: Yes.

MR JACKSON: Your Honour, I think the answer must – could I just say, your Honour, I cannot give your Honour a direct answer to that. I will check in just a moment. Your Honour will see at page 49 paragraph 73 there was a question of jurisdiction raised in the Tribunal in the first instance and then there was an appeal by us, of course, to the Court of Appeal in which the issue of jurisdiction was a principal issue in the appeal. As to the question of competency, your Honour, I did not think that the – the answer, I think, your Honours, is no.

Your Honours, if I might just say this in relation to the jurisdictional aspect of it, one might say of course there is a question of fact to be answered, but upon the answer to the question depends the question whether the Tribunal had jurisdiction. Your Honours, if a question of that kind, which is necessarily a matter of interpreting the statutory provision, if the Tribunal does not have jurisdiction, if that is the issue, if that is not a question of law, one might ask what is? It is a core question going to jurisdiction. Your Honours, it is not just one of those matters one can dispose of by saying this is just an appeal on a question of law.

Your Honours, could we go on to then to say that the Court of Appeal went on to hold, as your Honours will see, at page 129 paragraph 68, in the second sentence in that paragraph, that:

were the Court called upon to decide the same question as a jurisdictional fact, no error is perceptible in the approach of the learned primary judge.

Your Honours, could I go to the approach taken by the primary judge. Your Honours will see, if I can go to page 51, that he says in paragraph 79 “Returning to (2)”. The reference is to subparagraph (2) of paragraph 78 on the preceding page. He then goes on to refer to a number of definitions of “dust”. We make a criticism of the approach taken to those definitions, your Honours, and I will come back to that in just a moment, but could I, in the sense that we say the judges have not read them properly, with respect – but your Honours will see then he goes on to say that in the end he takes the view that – this is at paragraph 86 on page 53, about line 49:

the wording of the relevant sections of the Act encompasses smoke as a dust . . . In ordinary

common parlance, dust encompasses smoke or ash. Dust may need to be distinguished from gas, fume or vapour.

In the end, your Honours, he goes on to treat the issue as being whether there was particular matter in the material, and you will see that in the lines of paragraph 86 that are on page 54. Your Honours will see at paragraph 90 that he said the term "dust":

is not a scientific or technical term. It is an ordinary, common English word –

Your Honours, could we say in relation to that – and I am referring, Your Honours, to our written submissions at page 147 paragraph 25 – there is the reference to the passage in the Court of Appeal's reasons where it appeared to have agreed with him, but could we just say, your Honours, that if one looks at the term "dust" and one takes the definitions to which the judge referred at page 51, the approach taken by the judge – and, your Honours, I am referring to our submission at paragraph 24 on page 147 – the judge treated, in our submission, the term "finally powdered" substance as being a term applicable, in paragraph 3 of *The Macquarie Dictionary* extract, as being attributable only to "earth" rather than the composite expression "earth or other matter". Secondly, in the reference in *The Concise Oxford Dictionary* we would submit it is difficult to see how

the particulate matter in the oil smoke could be regarded in any ordinary usage of the language as powder or powdered.

Your Honours, the case is, in our submission, one where it is very strongly arguable, in our submission, that the decision on the question of whether it was or was not dust was erroneous. The Court of Appeal, in our submission, should not have dealt with the matter on the basis that it involved no question of law and it is a matter where the consequences of the Court of Appeal's finding are obviously capable of extension to other substances and to other circumstances and one where it is appropriate, in our submission, for the Court to determine that the potential enlargement of that Tribunal's jurisdiction should be stopped with respect at this point.

GUMMOW J: Mr Walker.

MR WALKER: Your Honours, as to the last point, there is no extension possible unless there is the kind of evidence in another case, which will, no doubt, be a different case, of the kind that you see the subject of findings in application book page 52, paragraph 82. That is the source and the only source of the factual material which could only be seen as factual upon which the finding of the Tribunal's jurisdiction was made. It requires there to have been dust

and there there are findings of the small particles suspended in the air and eventually settling – see paragraph 83 – which, for his Honour, answered the description of "dust".

No point of law is involved in the question whether material factually found to be in that form answers the description of the ordinary English word "dust" or not, and common sense supports that there must be many if not most occasions when both smoke and dust is generated, for example, by the explosive collapse of some structure. The fact that they are admixtured provides no reason whatever to overcome the beneficial purpose of the jurisdiction of this Tribunal defined by reference to "dust".

There are two factual matters, after all, that ground jurisdiction; one, that there be dust for which the defendant is responsible and, two, that there be the appropriate etiological link between that dust and the plaintiff's condition. Each of those depends upon the facts of the particular case and the fact that there may or may not have been smoke at one stage physically in conjunction with or containing the dust in question never raises a point of law. It is for those reasons, in our submission, that their Honours in the Court of Appeal were perfectly correct to decide the matter on the basis that the appellate jurisdiction before them was not enlivened.

Justice Gummow asked my learned friend about an objection to competency. I am told that there was a motion in the nature of summary dismissal of a kind that is apt to raise that question which was not persisted

with, I think, as a result of case management. It may be, in short, that because that was the issue that was going to most occupy the hearing it was thought as well to have only one hearing, but that is all I can say about that. It means that there was no formal objection to competency that was ever heard or decided. Whether that is the issue that decided the case, as my learned friend has - - -

GUMMOW J: We do not need to hear you any further, Mr Walker. Yes, Mr Jackson.

MR JACKSON: Your Honour, may I say three things. We would submit that on no ordinary use of language could oil smoke be regarded as dust. Secondly, the second thing we would say, is that smoke and dust may be mixed but not in this case and, normally speaking, one would not expect to see it. The third thing is that the decision, in our submission, of course is likely to have flow-on effects.

GUMMOW J: Accepting for present purposes that the question of whether the smoke, as it has been described in this case, was dust was a jurisdictional fact, we consider there is no reason to doubt that the Tribunal has made the correct determination. Accordingly, special

leave to appeal should be refused with costs.

MR WALKER: May it please the Court.

AT 2.39 PM THE MATTER WAS CONCLUDED
