

ANSWER TO QUESTION ON NOTICE TAKEN ON 25 JANUARY 2019

Background

The *Dust Diseases Tribunal Regulation 2013* (and its 2005 predecessor) contains a timeframe for the completion of malignant and non-malignant asbestos disease claims referred to as the "Claims Resolution Process" (hereafter the "CRP").

No issue is taken with the CRP and the timetable applicable to benign asbestos disease claims.

However, since the introduction of the CRP a number of Plaintiffs with malignant disease have died prior to the finalisation of their claims. Anecdotal evidence suggests that the proportion is as high as one third. The primary reason for this is the combination of the fact that mesothelioma can progress unpredictably and very quickly and the inflexibility of the timetable imposed by the CRP on malignant claims

An important factor in determining the actual timeframe applicable to each claim is the filing of cross-claims by a Defendant against other parties, for example, against a supplier of asbestos containing products. Where a Defendant does not issue cross-claims, the CRP requires the claim be finalised within 9 weeks. Where a Defendant issues a cross-claim, the CRP operates so that the claim must be finalised within about 11 weeks. If a Defendant requests a 10-day extension of time in which to file cross-claims (which the CRP requires the Plaintiff to provide in almost all circumstances) then the time for finalisation can extend to 15 weeks.

In the overwhelming majority of cases, the identity of a potential Cross-Defendant is well known to a Defendant by virtue of the fact that litigation concerning asbestos related disease claims has been taking place against the same Defendants in the Dust Diseases Tribunal of NSW (hereafter the "DDT") since 1989. Litigation against a "first time" Defendant is very rare.

Another relevant factor is that the timetables imposed by the CRP only have regard to business days. Further, the CRP excludes business days during the period commencing 25 December to 9 January in each calendar year when determining the applicable time table. The practical effect of that is that the Christmas and Easter periods have a significant impact on the length of a timetable.

Proposal

The only way to ensure that the maximum possible number of malignant claims is concluded within the lifetime of a Plaintiff is for all malignant claims to be case managed by a Judge of the DDT.

Section 12B of the *Dust Diseases Tribunal Act 1989* protects the entitlement to general damages if proceedings are commenced in the DDT in a Plaintiff's lifetime. Given the uncertainty that surrounds a Plaintiff's life expectancy, proceedings are often commenced at the earliest opportunity and before investigations of a claim are advanced, in order to obtain the protection afforded by Section 12B.

Case management would require the parties to appear before a Judge of the DDT after the Statement of Claim is served and the Plaintiff has requested the Registrar to list the claim before a Judge of the DDT for case management. Orders would then be made by the Judge for the service of particulars (supported by a statutory declaration or contained with an affidavit), orders for the filing and service of cross claims, service of medical evidence, issue of subpoenas, the filing of a defence (which should precisely identify the issues taken by a Defendant) and an order for the parties to attend mediation. The appropriate timeframe for all of that to occur would be 10 weeks from the date of the initial directions hearing (unless exceptional circumstances apply). The matter would then come back before a Judge so that terms of settlement can be filed (which could alternatively be done in the Registry) or a hearing date allocated. The parties would be given liberty to apply in the event of a change in the Plaintiff's condition, enabling a Plaintiff's lawyer to have the case listed before a Judge within 24 hours for the purpose of applying for expedition.

It is submitted that this proposal would not impose any additional costs burden on the parties. In practical terms, the proposal simply provides for an initial appearance before a Judge for procedural directions that would ultimately require the parties to perform the same work that the CRP currently requires of them. At the same time, the proposal requires that work to be performed within a timely manner (roughly consistent with the timetable presently imposed by the CRP in a single Defendant claim without cross claims) with quick access to the Tribunal in the event of sudden deterioration in a Plaintiff's condition.



Gerard McMahon

7 Febraury 2019

Date