IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S313 of 2010

BETWEEN: **DASREEF PTY LIMITED**

Appellant

and

NAWAF HAWCHAR

Respondent

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: ISSUES PRESENTED

2. The principal issue is whether, in order for an expert opinion to be admissible, it is a requirement of s 79 of the *Evidence Act 1995* (NSW) that the expert not only have expertise generally in the area of contention, but that the expert disclose facts, assumptions and reasoning in a manner sufficient to make it plain to the trial judge that the opinion is wholly or substantially based on that expertise.

3. Secondary issues may arise as to the adequacy of the other material available to the New South Wales Dust Diseases Tribunal at trial to support a finding of breach of duty, and in particular whether the Tribunal was entitled to rely upon its "expertise" as a "specialised tribunal" for this purpose.

PART III: REQUIREMENT FOR SECTION 78B NOTICE

4. The appellant certifies that it considers that no notice is required under s 78B of the *Judiciary Act* 1903 (Cth).

Filed on behalf of the Appellant:
Moray & Agnew
Lawyers
Level 24
233 Castlereagh Street
SYDNEY NSW 2000

DX 106 SYDNEY NSW
Tel: (02) 9232 2255
Fax: (02) 9232 1004
Ref: STJ:304517
Date of Document: 1 February 2011

PART IV: CITATIONS OF DECISIONS BELOW

5. Judgment of New South Wales Dust Diseases Tribunal (Curtis J): *Hawchar v Dasreef Pty Ltd* [2009] NSWDDT 12 ("DDT").

6. Judgment of New South Wales Court of Appeal: *Dasreef Pty Limited v Hawchar* [2010] NSWCA 154 ("CA").

PART V: FACTS

7. In the Dust Diseases Tribunal, the respondent sued the appellant ("Dasreef"), his former employer, for damages for scleroderma and silicosis. The Tribunal gave judgment in his favour on the silicosis claim for $131,130.43. On appeal to the Court of Appeal, the costs orders made in the Tribunal were set aside and the question of costs was remitted, but the appeal against the judgment itself was dismissed.

8. The appeal to this Court seeks to have the silicosis judgment set aside. The only issue for the purposes of this appeal is whether the breach of duty on Dasreef's part was established by admissible evidence.

9. The respondent worked with Dasreef from October 1999 until May 2005 as a labourer, and later a stonemason. In the course of that work, he was exposed to silica dust from handling and cutting stone. He had also been exposed to silica in the course of work in Lebanon before migrating to Australia and also in the course of carrying on stonework on his own account.

10. Some of the stone-cutting undertaken by Mr Hawchar had been undertaken with an angle grinder. Although Mr Hawchar had been required to wear (and had worn) a mask when undertaking such cutting, such masks are only designed to reduce, not eliminate, dust inhalation. As a result of his work, he would still have had some silica exposure. The question was whether the silica levels he would have encountered were unsafe.

11. Most silica dust which is inhaled does not reach the lungs. It is only the smallest particles which do so. This represents a relatively small proportion of the total silica dust and is known as "respirable silica" or the "respirable fraction" (T191.43-50).

12. For many years, there have been numerical exposure standards prescribed for respirable silica in the workplace. Those standards are published under the auspices of Worksafe Australia and are picked up and given legislative force by State occupational health legislation. In New South Wales, the relevant provision is reg 51 of the *Occupational Health and Safety Regulations 2001* (NSW) made pursuant to the *Occupational Health and Safety Act 2000* (NSW).

13. The health risks associated with the inhalation of respirable silica are thought to be related to the cumulative dose. The standard is therefore set, not at a peak "instantaneous" figure, but as a time-weighted average (TWA) over a 40-hour working week so as to set the standard at a level where exposure over a working life gives rise to an acceptable level of risk. At the time of

Mr Hawchar's work with Dasreef the standard was set at a TWA of 0.2mg/m^3 of air inhaled: CA [20]; DDT [65].

14. Mr Hawchar alleged that Dasreef had breached its statutory duty under reg 51, and had been negligent, by permitting him to be exposed to respirable silica at levels exceeding this standard.

15. On Mr Hawchar's case, the predominant contributor to his inhalation of respirable silica during his employment with Dasreef was when he was using an angle grinder to cut stone. The primary judge determined as a matter of fact that Mr Hawchar spent, on average, 30 to 40 minutes per week cutting stone with an angle grinder: DDT [56], [82]. In order to derive a TWA figure for Mr Hawchar's working week, the question for the primary judge then was what level of respirable silica had Mr Hawchar, on average, inhaled while undertaking such cutting work.

16. Mr Hawchar led evidence on this issue from Dr Kenneth Basden. Dr Basden was a retired academic. Since his retirement in 1987 he had worked as a consultant principally in the preparation of expert witness reports for the purposes of legal proceedings.

17. At the trial, Mr Hawchar tendered a report from Dr Basden: CA[40] . Dr Basden referred to both the US standard of 0.05 mg/m^3 TWA and the Australian standard of 0.2 mg/m^3 TWA and asserted that the "*actual dust concentrations generated in Mr Hawchar's breathing zone ... most certainly would not be from half to two ten thousandths of a gram [0.05 to 0.2 mg] per cubic metre of air, but more realistically would be of the order of a thousand or more times these values or even approaching one gram, or thereabouts, per cubic metre*". By way of explanation for this, Dr Basden said that he could only recall actually seeing sandstone being dry cut with an angle grinder "at a monument being erected at the entrance to a country town", but on that occasion the operators had been "enveloped by dense clouds of highly visible fugitive dust".

18. Dasreef objected to the admissibility of Dr Basden's report. The essential objection was that, to the extent that any relevant opinion could be discerned from what Dr Basden said, it had not been shown to be based on specialised knowledge possessed by Dr Basden. In particular, there was a lack of reasoning to show how any such opinion actually followed from such relevant scientific training study or experience that Dr Basden might possess. Dasreef relied upon the principles stated by Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744, [85].

19. The primary judge received Dr Basden's report into evidence. He then permitted Dr Basden to give further oral evidence, reserving the question of the admissibility of the whole of his evidence for further argument in final submissions: see CA [33]. As a result, there was some exploration of Dr Badsen's reasoning process, largely as a result of questions asked (over objection) by the primary judge himself: See T202, 209.31 – 210.5, 210.8 – 211.42, 213.41 – 214.2, T219.8, 219.32, 220.31- 222.13, 223.36 – 224.48.

20. In final submissions, Dasreef maintained its contention that Dr Basden's evidence, even taken as a whole, had not overcome the essential objection under s 79. The primary judge rejected this contention and treated Dr Basden's evidence as an opinion that, on average while Mr Hawchar was undertaking cutting work with an angle grinder, the atmosphere contained at least one thousand times 0.2mg/m^3 (ie 200mg/m^3) of respirable silica. After allowing for the effect of the mask worn by Mr Hawchar, his Honour derived a weekly TWA figure of 0.25 mg/m^3, thus exceeding the standard of 0.2 mg/m^3 (DDT at [82]-[83]).

21. In the Court of Appeal, Allsop P, with whom Basten and Campbell JJA agreed, upheld the finding of breach made on the basis of Dr Basden's evidence. His Honour accepted that Dr Basden had relevant training and experience in dust measurement generally. This was sufficient, it was said, to make his evidence admissible. Allsop P held that that evidence was, "*not a precise measurement or view expressed with precision, but rather an estimate drawn, permissibly, from his experience*". His Honour acknowledged that this was "*contestable and inexact*", but said that "*it was then for someone qualified as an expert to say that [Dr Basden's] estimate was worthless, or of little weight, or for some other reason unreliable*" (CA[43]) and *"[a] lack of reasoning did not make [Dr Basden's] opinion inadmissible*" (CA[44]).

PART VI: ARGUMENT

Admissibility of Dr Basden's opinion

22. Section 79 of the *Evidence Act* creates an exception to the "opinion rule" which excludes opinion evidence as evidence of the fact. Section 79 requires that, to be admissible, the opinion be "wholly or substantially based" on "specialised knowledge based on the [witness's] training study or experience".

23. In *HG v The Queen* (1999) 197 CLR 414 at 427-9 [39]-[44], Gleeson CJ said that these statutory requirements meant that expert evidence needed to be presented in a form which made it possible for the trial judge to determine whether the opinion was "wholly or substantially based" on specialised knowledge. These views were picked up by Heydon JA in support of his Honour's analysis in *Makita*, and in particular as support for the conclusion that some exposition of rational reasoning is required so that the court can be satisfied that the opinion has an admissible basis.

24. The principles stated by Heydon JA in *Makita* are widely cited at trial level, at least in New South Wales. There are, however, alternative views. In *HG,* Gaudron J at 433 [63]-[65] thought that the expert evidence in issue was not inadmissible by reason of the expert failing to expose his reasoning processes. In her Honour's view such matters went instead to weight. And in the Federal Court, a body of authority has grown up which treats Heydon JA's analysis as a "counsel of perfection" which goes more to weight than to admissibility. The leading decision is *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*, (2002) 55 IPR 354 at [10] (Branson J) and [87] (Weinberg & Dowsett JJ).

25. Sometimes the issue upon which an expert is asked to express an opinion is one which can only be answered in a speculative way. For instance, a medical expert may be asked to express an opinion about a how a patient's condition will develop in future. In such circumstances, full exposition of the expert's reasoning may be impossible as it may depend upon matters of "feel" based upon the expert's previous experience in treating patients with that condition. But that was not so in this case. The issue was whether a particular numerical level had been exceeded. As Dr Basden acknowledged in cross-examination, the airborne concentration of dust is governed by known laws of physics and chemistry (T203.23) and instruments are available which permit such concentrations to be measured with precision (T201.28).

26. Dr Basden, however, did not himself undertake any measurements of the respirable dust concentrations produced by cutting stone with an angle grinder. Nor did he refer to any such measurements undertaken by others. Nor did he present any theoretical calculations of what those concentrations might be. Instead his evidence took the form of an opinion as to what the concentrations had been based solely upon a lay description of the work which Dr Basden was asked to assume that Mr Hawchar had carried out. Or, at least, it was treated as such. This qualification is necessary because, in truth, it was never clear exactly what opinion Dr Basden was purporting to express. In his report, the thousandfold exceedence was expressed by reference both to the Australian standard and to the US standard, which was four times less than the Australian Standard and was not relevant. He said repeatedly that he was not able to offer, and was not purporting to offer, a numerical assessment of Mr Hawchar's exposure (T218.17, 218.34, 218.8). It was also unclear that his assertion of a thousandfold exceedence was even intended to represent an assessment of average concentration for the 30 to 40 minutes during which the primary judge found that Mr Hawchar was cutting. At different points in Dr Basden's evidence he appeared to be saying that the thousandfold exceedence occurred when Mr Hawchar actually had his head in a dust cloud or was working in a "tent" (T232.41), but the video in evidence showed that the operator would not usually have his head in a dust cloud when cutting[1] and the primary judge found that in fact there was no significant use of the "tent".[2] Dr Basden conceded that if a "tent" was not in use the figure could be a *thousand times* (three orders of magnitude) less (T231.3-.13).

27. Both the primary judge and the Court of Appeal sought to meet this by saying that the thousandfold exceedence was an "estimate" and a "range". But that

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[1] At [79] the primary judge noted that at a point 15 minutes and 39 seconds into a video demonstration of stone cutting processes and techniques the head of the person cutting was seen to be enveloped by visible dust generated by an angle grinder. But the rest of the video showed that this happened only when wind and air currents momentarily carried the stream of dust back towards the operator's head; otherwise it did not.

[2] DDT [38].

hardly does justice to the scale of the uncertainty in the present case. It must be borne in mind that the TWA ultimately found was only 0.25, 25% above the standard; if Dr Basden's estimate were reduced by one or more orders of magnitude the exposure would have been only a fraction of level prescribed by the standard.

28. Dr Basden undoubtedly had some relevant academic qualifications. He had experience in the general area of dust control and measurement, particularly in mining and fuel technology contexts (T198.43). He had taken dust counts on occasion in the past. However Dr Basden's report stated that he had only once seen angle grinders in operation, and it was clear from his oral evidence that this had been a casual observation: Dr Basden had made no attempt to measure the dust (let alone the respirable fraction) on that occasion (T202.45). Indeed he had never actually measured respirable silica dust in any circumstances that he could remember (T210.47 – 211.9). In the circumstances, the statement by the Court of Appeal that Dr Basden's opinion was based on his "experience" must be understood as a reference to experience only in the broadest and most general sense. There was no evidence of experience specific to the task in hand - the determination of quantities of respirable silica in the air *on the basis of a lay description of the work alone.*

29. There was no analytical basis shown for the opinion, or assumed opinion, that a cloud of silica dust liberated when cutting or grinding stone necessarily contains 200 mg/m^3 of respirable silica on an instantaneous basis. It was bare *ipse dixit.* Allsop P thought that it was "clear" from Dr Basden's oral evidence that his "*inexact estimate*" derived "in part" from the propositions that "*nuisance dust (by which [Dr Basden] meant the limit that should not be exceeded) would be barely visible in a room*" and that dusts have a consistent fraction of respirable content: CA[42]. But this explanation (which was not adopted by the primary judge) just raised more questions which were not answered in Dr Basden's evidence. It was impossible to work back from other evidence to verify that 'inexact estimate' since Dr Basden never explained mathematically how the nuisance dust "limit" related to the Australian standard for respirable silica of 0.2mg/m^3.

30. The approach of the Court of Appeal appears to have been that it was sufficient to establish that Dr Basden had qualifications or experience in the general area of debate. Once that was done Dr Basden's evidence was treated as admissible and the criticisms made of his lack of reasoning and the imprecision of the opinions expressed were matters which went to weight only. So understood, the Court of Appeal's approach in this case is quite different from its earlier analysis in *Makita* and in substance represents an application of the contrary view expressed in some of the authorities to which reference is made above.

31. Moreover in the present case, the Court of Appeal appears to have gone further than those authorities, by effectively casting an onus on Dasreef to lead its own expert evidence for the purpose of demonstrating the lack of validity of Dr Basden's opinions.

32. The difference between the views of Gleeson CJ and Gaudron J was not resolved in *HG*.[3] The divergence between *Makita* and *Sydneywide* has been noted, but not resolved, in subsequent cases: this was traced by Allsop J (as his Honour then was) in *Gambro Pty Ltd v Fresenius Medical Care Australia Pty Ltd* [2007] FCA 1828 at [31] to [43]. The issue has not subsequently been considered in this Court.

33. In the appellant's submission, the analysis of Heydon JA in *Makita* (based upon the reasoning of Gleeson CJ in *HG*) should be preferred to the alternative views to reference has been made above, and which appear to have been reflected in the Court of Appeal's decision in the present case. This is so for two reasons.

34. First, the analysis reflects the textual requirements of s 79. In terms, to satisfy the section, the opinion must be "wholly or substantially based" on the witness's "specialised knowledge". The requirement performs an important function. It guards against a spurious air of authority being accorded to the views of a witness who, although possessing expertise in a general sense, has not in fact brought "specialised knowledge" to bear in expressing the opinion in question.[4] Often it would be more dangerous to receive such an opinion into evidence than it would be to receive an opinion from a person with no relevant expertise at all, since the lack of value in the latter type of opinion would generally be more obvious.

35. It must therefore be for the proponent of the evidence to satisfy the court that the opinion is actually so based before it can be admitted. Rarely if ever could the court properly be so satisfied without the disclosure of how the asserted conclusion follows from the assumed facts, and a rational exposition of how the relevant "specialised knowledge" allows the witness to say that it does so follow. Certainly, in a case such as the present, where the issue was one of "hard science", some such explanation is required before the opinion could properly be seen to satisfy s 79.

36. Second, to permit evidence to be given in the form in question here will also often give rise to great practical unfairness. The opposing party is placed in the position of letting the evidence in and hoping that the tribunal of fact will give it no weight because of its lack of reasoning, or embarking upon a cross-

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[3] McHugh J did not consider the admissibility of the evidence by reference to ss 76 and 79 of the *Evidence Act*. Gummow J agreed at 197 CLR 449 [124] with Gaudron J's reasons on the application of those provisions. Hayne J at 453-4 [137]-[140] made some observations about the requirement that the opinion be "wholly or substantially based" on specialised knowledge but ultimately considered that the trial judge did not have sufficient material on which to base a conclusion that the witness could give no admissible opinion evidence, and held that the evidence was inadmissible by operation of a s 409B(3) of the *Crimes Act* with the result that there was no need for him to express a final view on the operation of ss 76 and 79.

[4] *HG* at 429 [44] per Gleeson CJ.

examination in the dark.[5] Such unfairness is heightened by the further step taken by the Court of Appeal in the present case, namely to cast an evidentiary onus on the opposing party to call its own evidence to demonstrate the unsoundness of the supposedly expert opinion tendered against it.

37. Section 79 was introduced following the publication of an interim report of the Australian Law Reform Commission, ALRC 26. That report referred to a suggested common law rule that "for expert opinion testimony to be admissible it must have as its basis admitted evidence", which has been labelled the "basis rule"[6]. In *Quick v Stoland* (which predated *HG*) Branson J referred to the report and pointed out that s 79 deliberately did not include "a provision which reflects the common law rule that the admissibility of expert opinion depends upon proper disclosure and proof of the factual basis of the opinion"[7]. In *Sydneywide*, her Honour repeated her comment.

38. However, the appellants' contention is not that s 79 contains a "basis rule" of the sort described by the ALRC which would require the facts underlying the opinion to be the subject of evidence before the opinion could be received. Rather the contention is that the section requires some rational exposition of how the witness employed "specialist knowledge" to derive the particular opinion from such facts, proved or assumed.

39. It has also been suggested that that too strict an attitude towards admissibility can lead to delay and inefficiency in the conduct of trials. But in a jury case or a case such as the present, where any appeal is limited to questions of law and admissibility of evidence,[8] the distinction between admissibility and weight is vital. There is neither statutory nor practical warrant in such cases for watering down the requirements of s 79.

40. Dr Basden's evidence, if treated as an opinion as to the average concentration of respirable silica in the air whenever Mr Hawchar was using an angle grinder was at least 200 mg/m^3, did not satisfy the requirements of s 79 as properly understood. The evidence was inadmissible.

Consequences of inadmissibility

41. Dr Basden's opinion was a key aspect of the primary judge's reasoning.[9] If that opinion was inadmissible, then at the very least the proceedings would have to go back for redetermination. But that should only happen if the remaining admissible evidence would be capable of supporting a finding of breach. The primary judge did refer to other factors in making his finding on that issue. But, in Dasreef's submission, these factors, upon analysis, are not properly capable of supporting such an adverse finding.

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[5] *Makita* at [62].

[6] ALRC 26 at [750].

[7] (1998) 87 FCR 371 at 373-4.

[8] DDT Act, s 32.

[9] CA at [24].

"Specialised tribunal"

42. The main factor upon which the primary judge drew was the supposed expertise of the Dust Diseases Tribunal as a "specialist jurisdiction". He said that this permitted him to take into account that silicosis "is usually caused by very high levels of silica exposure".[10] Dasreef criticized this aspect of his reasoning on appeal, but the criticism was rejected by the Court of Appeal.[11]

43. The Court of Appeal interpreted the trial judge's reference to his supposed expertise as saying nothing more than he could more readily comprehend the evidence which was before him. With respect, this appears to be a forced and unrealistic interpretation. It was quite clear that the primary judge was purporting to rely upon that "expertise" as an *additional* basis for making a factual finding about Mr Hawchar's degree of exposure. His Honour himself described this as being of "greatest significance" in making that finding.[12]

44. The idea that the Dust Diseases Tribunal can draw upon its status as a "specialist tribunal" has achieved some currency among its members. The relevant line of authority begins with the Full Court decisions in *Bryer v Metropolitan Water Sewerage & Drainage Board* and *Tame v Commonwealth Collieries Pty Ltd.* Both concerned awards of compensation made by the former Workers' Compensation Commission. In *Bryer* the worker was only partially incapacitated and it was argued that there was no evidence that his partial disability would reduce his earning capacity, or if so, the degree to which it would be reduced. The Full Court held that the Commission was entitled to draw on its general knowledge of "conditions of employment and rates of pay" for this purpose; otherwise "unnecessary and deplorable reduplication of expense" would occur.[13] In *Tame* the worker had contracted silicosis and the question was whether there was evidence to support the Commission's finding that his employment with the respondent employer was an "employment to the nature of which the disease [silicosis] was due".[14] The Full Court emphasized that the question was not whether the respondent's employment had in fact caused the worker's silicosis, but whether the employment had been such as to create a risk of contracting that disease generally. Relying upon *Bryer*, the Court held that the Commission could draw upon its "knowledge of silicosis" for this purpose.[15]

45. In *ICI Australia Operations Pty Ltd v Workcover Authority (NSW)* a worker recovered damages in the Dust Diseases Tribunal against his employer for mesothelioma and the employer brought further proceedings in the Tribunal for indemnity. One question in the Court of Appeal was whether there was

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[10] DDT at [87].

[11] CA at [21], [51] - [54].

[12] DDT at [87].

[13] (1939) 39 SR (NSW) 321 at 330.

[14] *Workers Compensation Act 1926*, s 7.

[15] (1947) 47 SR (NSW) 269 at 272.

sufficient evidence to support the Tribunal's finding as to when the worker had last been "employed by [the] employer in an employment to the nature of which the disease [mesothelioma] was due".[16] The Court reviewed the authorities, including those that related to the former Commission,[17] and held that the finding was supported by the judge's "knowledge as a member of a specialised tribunal".[18]

46. In Dasreef's submission, none of this justifies an appeal to the Tribunal's supposed "expertise" for the purpose of deciding the issue of breach of duty in the present case. The jurisdiction of the Tribunal under its governing statute, the *Dust Diseases Tribunal Act* 1989 ("DDT Act"), is to determine a particular class of common law claims, namely those relating to "dust-related conditions".[19] In doing so, the Tribunal is required to apply ordinary common law rules of substance and procedure, and in particular to follow the rules of evidence, except to the extent that they may be displaced by provisions of the Act.[20]

47. The primary judge did not in the course of the hearing, or even in his judgment, identify the previous decisions of the Tribunal, or any other relevant "experience", which supposedly established the proposition that silicosis is "usually" caused by "very high levels" of silica exposure. This clearly goes far beyond even the widest possible form of judicial notice.[21] There is nothing in the scheme of the legislation which supports the idea that the Tribunal should be entitled to determine a contested factual issue as to whether the defendant committed a breach of duty by appealing to unspecified "experience" in its final judgment.[22] Nor do the authorities go that far. In *ICI*, the Court of Appeal was careful to point out, as the Full Court had pointed out in *Tame*, that the issue was a general one of capacity to cause disease, not a specific question of what had caused the particular worker's disease.[23]

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[16] *Workers Compensation Act 1987*, s 151AB.

[17] When the Dust Diseases Tribunal was established, its members held commissions as judges of the Compensation Court, which had taken over the judicial functions of the old Workers' Compensation Commission. But following the abolition of the Compensation Court, the members of the Tribunal now hold commissions in the District Court.

[18] (2004) 60 NSWLR 18 at 64 [232].

[19] DDT Act, s 11.

[20] DDT Act, s 25(2).

[21] Judicial notice is provided for in s 144 of the Evidence Act. There is a debate about whether this covers the field to the exclusion of common law principles, see *ICI Australia Operations Pty Ltd v WorkCover Authority (NSW)* (2004) 60 NSWLR 18 at [219] - [232]; and *Crown Glass and Aluminium Pty Ltd v Ibraham* [2005] NSWCA 195 at [125].

[22] Compare the position of the Victorian County Court referred to in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 131-2 [14]-[16].

[23] (2004) 60 NSWLR 18 at 58 [190]-[191].

48. Indeed, the legislation contains a contrary indication. Section 25B of the DDT Act provides that previous findings "of a general nature" are binding in subsequent proceedings, unless the Tribunal grants leave to contest them. The Tribunal's rules provide for notice to be given by any party who seeks to rely upon such a finding for this purpose. It can hardly be supposed that it was intended that the limits in, and safeguards surrounding, s 25B could be evaded by the simple expedient of relying upon the Tribunal's supposed "specialist" expertise.

49. The Court of Appeal rejected this submission simply by saying that there was no need to distinguish the position of the Tribunal from that of the old Commission and referring to *ICI*. But that did not fully address the submission. The Court did not explain why the earlier authorities justified resort to "specialist knowledge" to determine a specific common law issue of breach of duty. That question had not arisen, and in particular there does not appear to have been any reference to s 25B, in *ICI*.

50. The primary judge's decision cannot be supported by reference to any supposed expertise as a "specialised tribunal".

Residual factors

51. Clearly if Dr Basden's evidence were rejected, there would be no basis for a finding of contravention of the 0.2mg/m^3 TWA standard in force at the relevant time. The plaintiff's pleaded case did include various generalised allegations of breach of duty based on "excessive" exposure to silica dust.[24] But apart from reference to the 0.2mg/m^3 TWA standard, such "excessive" concentrations were never defined in any numerical or other way. It was never, for instance, suggested that the state of scientific knowledge at the time of Mr Hawchar's exposure demanded adherence to some more stringent standard of exposure.

52. Nor did the suggestion that silicosis "usually" occurred following "heavy" exposure assist. Neither of these terms was defined in any meaningful way: indeed Mr Hawchar's expert refused to say numerically what he meant by "heavy" exposure. There was thus no way in which any conclusion could be drawn in terms of what was "excessive".

53. There was no legitimate alternative basis for finding against Dasreef once Dr Basden's evidence was rejected, and Mr Hawchar's claim should have failed.

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[24] Mr Hawchar claimed damages on the basis of allegations of breaches statutory duty (namely, s 41 of the *Factories Shops and Industries Act;* Regulations 73(9) and (10) of the *Construction Safety Act;* and Regulations 15, 51-55, 71, 76 and 78 of the *Occupational Health and Safety Act* 2000*)* and breach of a common law duty of care as an employer.

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

54. Refer to annexure 1.

PART VIII: ORDERS SOUGHT

55. Appeal allowed.

56. Set aside order 1 made by the Court of Appeal on 6 July 2010 and in lieu thereof, order that:

(a) the appeal to the Court of Appeal be allowed;

(b) orders 2, 3 and 4 made by the Dust Diseases Tribunal on 15 July 2009 be set aside;

(c) in the Dust Diseases Tribunal proceedings, judgment be entered in favour of the appellant-defendant;

(d) alternatively to (c), the proceedings be remitted to the Dust Diseases Tribunal to be dealt with according to law;

(e) (in accordance with the undertaking given by the appellant as a condition of the grant of special leave), the appellant pay the respondent's costs of the proceedings in this Court and the costs orders made by the Court of Appeal not be disturbed.

Dated: 1 February 2011

for **D F Jackson QC**

Phone: (02) 8224 3009

Fax: (02) 9233 1849

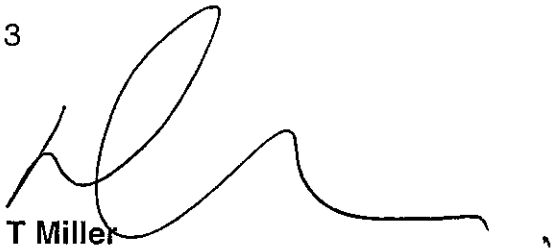
Email: jacksonqc@sevenwentworth.com.au

T G R Parker SC

Phone: (02) 8224 3032

Fax: (02) 9233 1849

Email: parker@sevenwentworth.com.au



D T Miller

Phone: (02) 9233 8799

Fax: (02) 9233 1849

Email: miller@sevenwentworth.com.au

ANNEXURE 1

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

54. The following provisions are still in force, in the same form, as on the date of making this submission:

(a) *Evidence Act 1995* (NSW), s 79 and s 144.

(b) *Dust Diseases Tribunal Act* 1989 (NSW), s 25B.

(c) *Occupational Health and Safety Regulations 2001* (NSW), reg 51.

(a) *Evidence Act 1995* (NSW):

"s 79 Exception: opinions based on specialised knowledge:

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences."

"s 144 Matters of common knowledge:

(1) Proof is not required about knowledge that is not reasonably open to question and is:

(a) common knowledge in the locality in which the proceeding is being held or generally, or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

(b) *Dust Diseases Tribunal Act* 1989 (NSW), s 25B:

"s 25B General issues already determined:

(1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.

(1A) If an issue of a general nature already determined in proceedings before the Tribunal (the "earlier proceedings") is the subject of other proceedings before the Tribunal (the "later proceedings") and that issue is determined in the later proceedings on the basis of the determination of the issue in the earlier proceedings, the judgment of the Tribunal in the later proceedings must identify the issue and must identify that it is an issue of a general nature determined as referred to in this section.

(2) In deciding whether to grant leave for the purposes of subsection (1), the Tribunal is to have regard to:

(a) the availability of new evidence (whether or not previously available), and

(b) the manner in which the other proceedings referred to in that subsection were conducted, and

(c) such other matters as the Tribunal considers to be relevant.

(3) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances or (without limitation) in relation to specified kinds of issues.

(4) This section does not affect any other law relating to matters of which judicial notice can be taken or about which proof is not required."

(c) *Occupational Health and Safety Regulations 2001* (NSW), reg 51:

"reg 51 Atmospheric contaminants-particular risk control measures:

(1) An employer must ensure that no person at a place of work is exposed to an airborne concentration of an atmospheric contaminant that

exceeds or breaches a standard referred to in or determined under subclause (2).
Maximum penalty: Level 4.

(2) For the purposes of subclause (1), the standard is as follows:

(a) for atmospheric contaminants other than synthetic mineral fibre dust-as determined in accordance with the documents entitled " *Guidance Note on the Interpretation of Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC: 3008]* " and " *Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC: 1003]* ", as amended from time to time by amendments published in the Chemical Gazette of the Commonwealth of Australia,

(c) for synthetic mineral fibre dust if almost all the airborne mineral is fibrous-in addition to a respirable standard determined under paragraph (a), an exposure standard of 2 mg/m 3 (TWA) of inspirable dust, but where the inspirable standard is not to take precedence over the respirable standard,

(d) for dusts not otherwise classified-10mg/m 3 (TWA) inspirable dust exposure standard applies."