

CONTRIBUTIONS ASSESSMENT

DUST DISEASES TRIBUNAL

MATTER NO: 80/2009

Arthur William Beach

Plaintiff

Wilgroup Pty Limited

First Defendant

Clarke Equipment Australia Pty Limited

Second Defendant

Amaca Pty Ltd

Third Defendant

DETERMINATION

INTRODUCTION

By letter dated 19 May 2009 bearing the signature of the Registrar of the Dust Diseases Tribunal

I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal that contains the following material upon which I rely in making this determination:

1. Plaintiff's Statement of Particulars ("Particulars")
2. Second Defendant's ("Clarke") Reply
3. Third Defendant's ("Amaca") Reply

In addition to the material described at 1-3 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007. I am not permitted to rely on any other document or other material.

I assume that each defendant sued by the Plaintiff, who is a 79 year old male who has allegedly contracted Mesothelioma , is liable to the Plaintiff.

I have been informed by the Solicitor for the Plaintiff that the First Defendant ("Wilgroup") will not take any part in the proceedings for reasons not relevant to this Determination.

Clark asserts in its Reply that Wilgroup should be categorised as a Category 1 Defendant on the basis that Wilgroup designed fire doors containing an asbestos core and as a and Category 2 Defendant on the basis that Wilgroup employed the Plaintiff. The Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 states that a Defendant is to be categorised as a Category 1 Defendant if it is the manufacturer of a product that contains

asbestos. I consider that Wilgroup is properly categorised as a Category 1 and Category 2 Defendant for the reasons argued by Clark.

Amaca submits that it should be categorised as a Category 2 Defendant only for the period be it is sued by the plaintiff as an occupier of premises where the plaintiff was exposed. It is clear that the basis upon which a Plaintiff proceeds against a Defendant is not relevant to the categorisation of that Defendant under the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007. The basis upon which the Plaintiff joins a Defendant may be relevant in the determination of issues of that Defendant’s liability to the Plaintiff but I do not consider that it is relevant to the determination of issues as between Defendants. Amaca is a category 1 Defendant for all periods as a manufacturer and supplier of asbestos products.

PLAINTIFF’S ALLEGATIONS OF EXPOSURE

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the Plaintiff’s respiratory system of asbestos dust and fibre.

The Plaintiff was allegedly exposed while employed by Wilgroup as a draftsman in 1948. For five months he worked in the vicinity of other workers who were cutting asbestos. The intensity of this exposure is not described with any particularity.

He was allegedly exposed while working for Clark in a period from 1958 to 1965. He alleges that he was required to attend the Amaca Camellia factory every 4 to 6 weeks. He alleges that: “I

met with the factory manager....the majority of these meetings were in the James Hardie offices; however I recall on one occasion that I spent approximately 2 hours in the James Hardie factory to perform a demonstration about a forklift. I recall that during this demonstration there were numerous sheets of fibro moving along a production line and being loaded onto pallets. I recall looking up into the atmosphere and when the sun shone through the windows, I could see dust particles in the atmosphere.”

The plaintiff alleges two periods of exposure to Amaca products while performing home renovations. The first period was in 1959 and 1960 when the plaintiff added a carport to his home in Caringbah. His exposure occurred while working with corrugated asbestos cement fibro sheets. This work took “*some weeks to complete*” and was performed on weekends. The second period occurred in 1979 when the plaintiff added an ensuite to a bedroom, constructed a carport, and converted a garage to a rumpus room. Documents attached to the Particulars note that a Development Application made to Warringah Council for this work specified the use of asbestos cement in the renovations.

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The Plaintiff’s most significant alleged exposure occurred while he was employed by Wilgroup. Given that it occurred first in time this exposure is likely to have been the most relevant in the cause of his Mesothelioma. His employment with Wilgroup lasted 5 months. Although as much is not stated expressly in the Particulars I assume he worked 8 hours per day, five days per week for Wilgroup, this totals 800 hours employment. It would be reasonable to conclude that the

Plaintiff was not exposed the entire time he was at work and that there were variations in the intensity of his exposure. For this reason I assume that the Plaintiff experienced 600 hours exposure while employed by Wilgroup.

Although it is unclear precisely what allegations the plaintiff makes against Clark, the exposure with Clark appears to have been minimal. It seems that the Plaintiff alleges a two hour period of exposure only. It is argued by Clark in its reply that the exposure was so insignificant as to have been de minimus. I am required to assume Clarke is liable together with the other two defendants sued by the Plaintiff but the de minimus submission does not have force.

The length of the period of exposure to Amaca products is equally unclear. Clark submits it is appropriate to assume the Caringbah exposure was 10 hours and the Terry Hills exposure was 20 hours. This is not outright speculation but is based on photos of the structures upon which the work by the Plaintiff was allegedly performed. In the absence of any estimate from the plaintiff I consider these periods put forward by Clark to be acceptable.

The Plaintiff therefore experienced a total of 632 hours exposure.

600 hours occurred during the plaintiff's employment with Wilgroup. This is approximately 95% of the total. 2 hours occurred when the plaintiff was employed by Clark. This is approximately 0.3% of the total. I consider it appropriate to apportion liability for this exposure 60% to Amaca as a Category 1 defendant and 40% to Clark as a Category 2 Defendant which results in 0.18% to

Amaca and 0.12% to Clark. 30 hours exposure occurred while the plaintiff performed home renovations using Amaca products. This is approximately 4.7% of the total.

I consider it appropriate to determine contribution as follows:

- Wilgroup – 95%
- Clark – 0.12%
- Amaca - 4.88%

Wilgroup should be the Single Claims Manager however I have been informed that Wilgroup is taking no part in the proceedings. The Single Claims Manager is to manage and negotiate the plaintiff's claim and for practical purposes therefore the Single Claims Manager must participate in the proceedings. I appoint at random Amaca as Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred', written in a cursive style.

Toby Tancred

Date: 27 May 2009