

**IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES**

DDT No. 32 of 2010

BETWEEN:

GERARD EDMOND EMILE DUBOSQ
Plaintiff

AND

SELTSAM PTY LTD
First Defendant

AMACA PTY LTD
Second Defendant

CHRYSOTILE CORPORATION OF AUSTRALIA PTY LTD
Third Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 24 February 2011 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**) for a determination of apportionment as between the defendants.
2. The determination is to be made by me on the papers, on the assumption that the Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (**Standard Presumptions**). I have been asked to appoint a Single Claims Manager.
3. The proceedings were commenced by Statement of Claim in February 2010. At that time the alleged injury was asbestosis. The plaintiff's solicitors filed a Statement of Particulars on 12 November 2010 based on that injury. In early December Mr Dubosq was diagnosed with mesothelioma. A Further Amended Statement of Claim

was filed on 22 December 2010 with amended particulars of injury. The defendants to that claim are Seltsam Pty Ltd (**Seltsam**), Amaca Pty Ltd (**Amaca**) and Chrysotile Corporation of Australia Pty Ltd (**CCA**).

4. Mr Dubosq sets out at paragraph 3.1 of his Statement of Particulars his employment history in France and Australia from 1966 to the present. It would appear that until at least late 2010 he remained employed as an occupational health officer for the Australian Productivity Commission. He had three periods of exposure to asbestos during his employment between about 1971 and 1978.
5. It is convenient to set out in its entirety Mr Dubosq's description of his exposure to asbestos from paragraph 4.1 of his Statement of Particulars:

“a. I was exposed to asbestos from my employment with the Chrysotile Corporation of Australia Pty Ltd (“CCA”), Wunderlich Limited (“Wunderlich”) and James Hardie & Coy Pty Ltd (“JHC”).

CCA

- b. I began working at CCA as a lab technician in about 1971. I worked there for about 1 year and 11 months until about 1972. Throughout my employment, I was located at the Woodsreef Asbestos Mine in Barraba, NSW. The mine was owned by Woodsreef Mines Ltd.*
- c. The mine was open-cut and it operated 24 hours a day. I was one of three lab technicians who worked rotating shifts. The laboratory was located on the ground floor of the mill. The door which connected the laboratory to the mill was frequently left open. The crushing mill was about 30 metres from my work area and dust was always present in my workspace.*
- d. My job involved the continuous monitoring and testing of the mined asbestos. The samples were brought to the laboratory from the mill. However, I was sometimes required to go to the milling areas where the asbestos was being*

crushed. The crushing process was very dusty and whenever I walked through the mill I was exposed to asbestos dust.

- e. One of my tasks involved using a machine that filtered asbestos into smaller particles. There was a lot of dust that was released from the samples when they were being tipped onto the screens and when the screens were shaken to filter the fibres into smaller particles. In addition, there was a mini-mill in the laboratory where asbestos was crushed to finer grades as required for different tests to be performed. This released asbestos dust into my work space.*
- f. Another task that I regularly performed was mixing the asbestos samples with cement to evaluate tensile compression. Whenever I mixed asbestos with cement, asbestos dust was released into the environment which I could not help but breathe in.*
- g. I recall that masks were provided and sometimes used. I was not told that I needed to wear them. I found the masks very uncomfortable and generally did not wear them.*

Wunderlich & JHC

- h. Between 1972 and about 1977, I was employed as a lab technician by Wunderlich at their factory at Rosehill ("the factory"). In the last few months of my employment, JHC took over the factory, and my employment was transferred to JHC.*
- i. I worked in the materials testing laboratory at the factory. I performed tests which involved the mixing of various grades of asbestos with other materials to conduct tensile and weight assessments.*
- j. About twice a month, I worked on the mixing floor of an asbestos-cement prototype machine to oversee mixes of asbestos and cement and other materials. The conditions in this area of the factory were very dusty. I spent about 5 hours per week in this area of the factory and inhaled large amounts of asbestos dust. I was issued with a filter cartridge mask when I worked in these areas of the factory, but it was impractical to wear it due to body movement,*

constant bending and the heat. It was not mandatory to wear the mask so I didn't.

- k. My job also involved monitoring asbestos dust levels in the factory. Sometimes these dust levels were so high that production processes were stopped at the direction of the company Occupational Health Officer. There was visible dust in the air in the factory, but that was not enough for the production processes to be stopped; the dust levels needed to be much higher than that before the Occupational Health Officer would act.*
- l. Samples of every shipment of asbestos were tested at the laboratory. I pierced a hole in many of the bags from each shipment, took samples by hand and taped the hole up. The testing of each sample was conducted in a booth that was fitted with an exhaust unit to help with the removal of airborne dust. However, dust still escaped during this process, even with the exhaust unit operating. I got (sic) on my clothes and in my hair. I could not help but breathe in this dust.*
- m. Asbestos samples were tipped onto screens outside of the booth. I did this several times each day. Whenever I performed this task I used a cartridge filtration mask. However, large amounts of asbestos dust residue was released into the general work area whenever I, or others, performed this task."*

- 6. Mr Dubosq was unable to estimate as a percentage his exposure to asbestos in each role.
- 7. In answer to the other questions posed in the Statement of Particulars Mr Dubosq mostly referred back to the answer set out in paragraph 5 above.
- 8. Annexed to Mr Dubosq's Statement of Particulars is the medical report of Dr Anthony Johnson dated 14 August 2009. He gave an occupational history to Dr Johnson in which he said that he had daily exposure to asbestos when testing samples during his employment with CCA. All of the samples he worked with were prepared by hand. He worked shifts lasting 8 – 16 hours. Otherwise his description

of his work to Dr Johnson largely reflects his description in the Statement of Particulars.

DDB File

9. Mr Dubosq said in his Statement of Particulars that he had lodged claims with the Dust Diseases Board (**DDB**) in 2005 and 2008.

10. The DDB file is attached to Seltsam's Reply. In describing his experience at CCA he said that as there were only 3 lab technicians he sometimes worked a double shift to allow his colleagues days off. When filtering asbestos using the filtering screens he would shake the screen vigorously and "*there was a lot of dust released from the samples*". Dust was always present in his workplace due to the proximity to the crushing mill. He said dust was constantly present inside and outside the laboratory and was exposed for the duration of the approximately 60 hrs he worked each week. His exposure to asbestos increased when he visited the milling areas.

11. In respect of his description to the DDB of his exposure at the Rosehill factory he said that "*...unlike the Barraba mine the Wunderlich Laboratory had a booth that was fitted with an exhaust unit to help with the removal of airborne dust that resulted from shaking and filtering the asbestos samples. He mentioned that the booth could never be completely closed and some dust escaped whenever the door was opened and closed and also during the testing even with the exhaust unit open*".

12. The DDB report as to this period of exposure concluded as follows "*Mr Dubosq recalled that he was usually covered with asbestos dust for the duration of each shift and he considered (sic). He estimated that he had been exposed to the possible inhalation of slight but constantly-present airborne asbestos dust for the whole of each normal workday and also to quite high concentrations of asbestos dust and other dusts such as silica when overseeing operations on the mixing floor for two days each month*".

Seltsam's Reply

13. Seltsam concedes that Mr Dubosq suffers from mesothelioma.
14. Seltsam does not have access to employment records regarding the plaintiff.
15. Seltsam admits that it occupied and controlled the Rosehill factory premises from 1972. That control ceased on 1 August 1977 when Amaca took over ownership of the factory.
16. Seltsam submits that it and Amaca should be placed into Category 1. It says that CCA should be placed into both Category 1 and Category 2 as it was both Mr Dubosq's employer and operated as an asbestos miner.
17. Seltsam submits that the plaintiff's exposure at the Barraba mine while employed by CCA was higher than the Rosehill exposure and points specifically to the use of an exhaust unit to help in the removal of the asbestos at the latter premises. In respect of the exposure in Barraba it notes that asbestos was in his work environment having blown in from ducts in the ceiling.
18. In summary, Seltsam submits that the following apportionments should apply:

Period of Exposure	Premises	Approx period of exposure	Percentage on a time on risk basis	20% variation due to higher level of exposure	Calculation
1971 -	CCA	23	(23/89) =	46%	46%

1972	factory	months	26%		
1972 - 1978	1972 - 1977 (Rosehill)	54 months	66/89 = 74%	54%	(54/66 months) x 54% = 44%
	1977 - 1978 (Rosehill)	12 months			(12/66 months)x 54% = 10%

19. According to Seltsam the apportionments are:

CCA 46%
 Seltsam 44%
 Amaca 10%

Amaca's Reply

20. Amaca admits that Mr Dubosq suffers from mesothelioma and that it was caused by exposure to asbestos. It says that he has other, related, disabilities arising from unrelated medical conditions.

21. Amaca admits that it controlled the Rosehill factory from 1 August 1977 and that the plaintiff was exposed to asbestos during that employment.

22. As to categorising the parties Amaca makes the same submission as Seltsam that CCA should be placed into both Category 1 and Category 2 as CCA was both a miner and employer.

23. Amaca does not submit that the Standard Presumptions should be varied on any other basis.

24. In respect of the plaintiff's employment Amaca attaches an employment card to its reply and says that the card "...would suggest that the employment was in part from

23 January 1978 to 3 March 1978. Previous notations on the card should be taken as referring to his period of Wunderlich employment, based on the plaintiff's own evidence".

25. In summary Amaca submits that the apportionment, based on a time on risk analysis, is as follows:

Wunderlich	(5.5 years)	66 months
Amaca (23/1/78 – 3.3/78)	(5 weeks)	1.25 months (allow 2 months)
CCA		23 months
Total		91 months
Wunderlich (Seltsam)	66/91	72.52%
Amaca	2/91	2.20%
CCA	23/91	25.28%
Total		100%

26. There is a footnote to Amaca's submission that that Seltsam's reference to 12 months in its Reply must be a typographical error which should read "1 – 2 months".

CCA's Reply

27. CCA does not admit that Mr Dubosq is suffering from the injuries he alleges but does intend to have him examined by Dr Breslin in order to ascertain his condition.

28. CCA admits that it controlled the premises where Mr Dubosq alleges his exposure occurred in 1971 – 1972 but cannot confirm that he was employed there.

29. CCA is limited by the information it has available but its position appears to be that if Mr Dubosq can prove that he was employed by it and that he was exposed to asbestos it will admit that it breached statutory or common law duties owed to the plaintiff.

30. As to categorising the parties CCA submits as follows:

Seltsam	Category 1
Amaca	Category 1
CCA	Category 2

31. It submits that the Standard Presumptions should not be varied.

32. CCA does not make any submission as to the method of calculation of the final apportionment between the parties.

Assessment

33. There is consensus that Seltsam and Amaca should be placed into Category 1. As to CCA it operated as a miner and so must fall into Category 1: Standard Presumptions Cl 5(2)(a). I do not think it should also be placed into Category 2 merely by reason of being an employer. Plainly Amaca and Seltsam also employed Mr Dubosq to perform largely the same role (lab technician) but they are not category 2 defendants. To place CCA into both Category 1 and 2 would be inequitable. Accordingly, all of the defendants shall be placed into Category 1.

34. Applying Clause 3 of the Standard Presumptions the relevant factual considerations are:

- (a) The disease suffered is mesothelioma, an indivisible disease;
- (b) There were two periods of exposure 1971 – 1972 in Barraba and 1972 – 1978 at Rosehill. His last exposure occurred in 1978 and so the lag time is consistent with the diagnosis of mesothelioma.
- (c) Mr Dubosq appears to have been exposed to some chrysotile asbestos and some other asbestos of unclear composition.
- (d) Each of the defendants were large and sophisticated entities with knowledge of the dangers associated with asbestos exposure.
- (e) Masks were offered to Mr Dubosq by each of the defendants, although wearing them seemed difficult and no employer made it mandatory.

35. There is no overlap in the period of exposure between the defendants.

36. In my view, the plaintiff's exposure at the CCA laboratory was more intense than at Rosehill. I am particularly conscious that his work environment was only 30 metres from the crushing mill and the door to the mill was often left open. Further, his role of continuous monitoring and testing of asbestos resulted in virtually constant and immediate exposure to asbestos in his employment.

37. By contrast in his role at Rosehill, whilst still being exposed to asbestos, the conditions appear to have improved at least to the extent that there was a dust extraction unit provided to minimise his exposure to asbestos. There were deficiencies in the dust extraction unit but it was an improvement on the position in place in the CCA Laboratory. His recollection to the DDB is that he had "*slight but constantly present airborne asbestos*" each day and to quite high concentrations two days per month when overseeing work on the mixing floor.

Period of Employment

38. There are conflicts in the evidence on the period of Mr Dubosq's employment with Amaca. He says in his Statement of Particulars at paragraph 3.1 that it ranged

between 1977 and 1978. At paragraph 4.1 he then says he was employed for a “few months” after Amaca took over from Wunderlich.

39. In the DDB file it says that Mr Dubosq provided a copy of a reference from BE Wilkins which said “*Mr Dubosq was under his control until early 1978 and had commenced work with Wunderlich Limited in Sydney on 20th November 1972 as a laboratory technician*”. That evidence does seem to accord with the staff record card that is annexed to Amaca’s Reply. What that document shows is that annual leave was calculated from 1 August 1977 (the day Amaca assumed control from Seltsam). Sick leave was calculated from 2 August 1977. The staff record has under the heading “engaged” two dates 20 November 1976 and 23 January 1978. I am unsure how to resolve the conflict between those two dates.

40. The document indicates that he resigned on 3 March 1978. I consider that it is most likely that Mr Dubosq commenced employment with Amaca on the day it assumed control of the Rosehill factory (1 August 1977) and that his employment ceased on 3 March 1978. I find that he was employed by Amaca for 7 months.

41. Mr Dubosq was employed by Wunderlich for 68 months (December 1972 – July 1977 incl) and CCA for 23 months. The total period of exposure is 98 months.

42. Therefore the proportion of liability based on a time on risk basis at the respective laboratories is as follows:

Rosehill $75/98 = 76.5\%$

CCA $23/98 = 23.5\%$

43. It is difficult to allocate a fixed amount based on Mr Dubosq’s description of his exposure in the Statement of Particulars and to the DDB. Mr Dubosq was unable to allocate a percentage amount himself. Doing the best I can I consider his exposure

during employment with CCA was more intense and sustained. I think it is appropriate to make an increased adjustment of 10% as against CCA. Therefore the adjusted portions are:

CCA 33.5%

Rosehill 66.5%

44. Allowing for the adjustment but keeping the proportions as between Amaca and Seltsam the same according to the time on risk at Rosehill gives the following result:

Amaca $7/75 \times 66.5\% = 6.2\%$

Seltsam $68/75 \times 66.5\% = 60.3\%$

45. Accordingly the final apportionments are:

Seltsam 60.3%

Amaca 6.2%

CCA 33.5%

46. I have been asked to appoint a Single Claims Manager (**SCM**). Applying Reg 61(5) of the Regulations Seltsam is the primary defendant and is the first possible SCM. I nominate it as the SCM.

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David Jay

1 March 2011