

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No 158 of 2010

BETWEEN: **GRAHAM JOHN GROCOTT AS EXECUTOR OF THE
ESTATE OF THE LATE RAYMOND ANDREW GROCOTT**
Plaintiff

AND: **AMACA PTY LIMITED**
First Defendant

AND: **STATE OF NEW SOUTH WALES**
Second Defendant

AND: **SELTSAM PTY LIMITED**
Cross-Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* (hereinafter referred to as “the Regulations”) for a determination of apportionment as between the Defendants.
2. Regulation 47(1) provides “A reference in this Division to a defendant includes a reference to a Cross-Defendant.”
3. Regulation 49 of the Regulations provides that this determination is to be made on the assumption that the Defendants are liable and the determination is to be made solely on the basis of the Plaintiff’s Statement of Particulars and the Defendants’ replies to the claim together with the application and the Standard Presumptions as to apportionment determined by the Minister.
4. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as “the Standards Presumptions Order”) provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.

5. In the present matter, Raymond Andrew Grocott (hereinafter referred to as “the Deceased”) commenced proceedings in the Dust Diseases Tribunal of New South Wales by issuing a Statement of Claim bearing date 11 June 2010 in which he alleged that

- (i) Between about 1948 to 1955 the Deceased was engaged in both commercial and domestic construction and renovation carpentry work, and in the course of performing that work the Deceased was exposed to asbestos dust and fibre emanating from products manufactured and/or supplied and/or distributed by Amaca Pty Ltd (hereinafter referred to as “Amaca”).
- (ii) Additionally, in about 1951 the Deceased constructed his own home at 48 Maud Street, Goulburn and in the course of performing that work the Deceased was exposed to asbestos dust and fibre emanating from products manufactured and/or supplied and/or distributed by Amaca.
- (iii) Additionally, in early 1971 the Deceased constructed a home for his friend Neville McLoughlin in Bishop Street, Goulburn and in the course of performing that work the Deceased was exposed to asbestos dust and fibre emanating from products manufactured and/or supplied and/or distributed by Amaca.
- (iv) Additionally, from on or about 1956 to 1987 the Deceased was employed by State Rail Authority and while so employed was exposed to asbestos dust and fibre.
- (v) The Deceased alleged that by reason of the inhalation of asbestos dust and fibre he contracted a malignant pleural mesothelioma.

6. The condition from which the Deceased alleged to be suffering, namely malignant pleural mesothelioma, is of course an indivisible one.

7. On 18 June 2010 the Deceased amended his Statement of Claim and made the following allegations:

- (i) From on or about 1948-1955 the Deceased was employed as an apprentice builder and thereafter builder/carpenter and during the course of his employment was exposed to asbestos dust and fibre.

- (ii) Additionally, in about 1951 the Plaintiff constructed his own home at 48 Maud Street, Goulburn in the State of New South Wales and in the course of that was exposed to asbestos dust and fibre.
- (iii) Additionally, in early 1971 the Plaintiff constructed a house for Neville McLoughlin in Bishop Street, Goulburn and in the course of that was exposed to asbestos dust and fibre.
- (iv) In relation to all of the Deceased's exposure as previously set out, it was alleged that Amaca was the manufacturer, supplier and/or distributor of the asbestos materials to which the Deceased was exposed.
- (v) Additionally, from on or about 1956 to 1988 the Plaintiff was employed by the State Rail Authority and in the course of that employment was exposed to asbestos dust and fibre from asbestos cement products manufactured and/or supplied by Amaca.

8. The Deceased died on 18 June 2010.

9. On 20 July 2010 an Amended Statement of Claim was filed substituting Graham John Grocott (hereinafter referred to as "the Plaintiff") as the Plaintiff in the proceedings. In other respects, the Amended Statement of Claim made the same allegations that had been previously alleged in the Plaintiff's Statement of Claim.

10. It is apparent from the record of the Dust Diseases Tribunal that the Deceased's evidence was taken on 12 June 2010

11. Admitted as evidence, namely as PX-1, was an affidavit of the Deceased which, so far as is relevant, provides as follows:

- (i) In mid-1948 the Deceased enrolled in a carpentry course.
- (ii) The first job the Deceased had was with Pury Bissiker where he worked for 12 months doing domestic renovation and construction work. A great deal of fibro was used, including flat sheets and Tilux. It was always dirty and dusty work working for Mr Bissiker.

- (iii) The Deceased then worked for Roy Swaith who built spec homes on blocks of land and in which asbestos cement fibro was used internally and externally together with Tilux.
 - (iv) Thereafter, for 6 years mainly performing work for the Housing Commission and Housing Commission homes were all asbestos cement fibro sheets and always James Hardie sheets were used.
 - (v) In 1956 the Deceased obtained employment with the State Rail Authority as a carpenter and his job involved the repair and replacement of corrugated roofs on train stations. The corrugated sheeting came from James Hardie. Additionally, work was done on train stations using flat sheets in wet areas and asbestos ridge capping on the roofs.
 - (vi) The Deceased remained at State Rail Authority for 31 years.
 - (vii) In 1951 the Deceased built a home at 48 Maud Street, Goulburn and used asbestos cement fibro sheets in the wet area, bathroom, laundry and toilet.
 - (viii) In 1970 the Deceased did a job for Mr Neville McLoughlin where the house was clad in entire "shadow lining".
12. On 19 July 2010 Amaca issued a Cross-Claim against Seltsam Pty Ltd (hereinafter referred to as "Seltsam") claiming indemnity or, alternatively, contribution from Seltsam.
13. On 27 July 2010 Amaca filed a Defence to the Plaintiff's Statement of Claim.
14. On 27 July 2010 the State of New South Wales filed a Defence.
15. On 27 July 2010 the State of New South Wales filed a document entitled "Submissions" which referred to evidence being given by the Deceased and that such evidence disclosed:
- (i) The Deceased worked with the State of New South Wales from about 1956 to 1967 (i.e. 11 years).
 - (ii) The Deceased did not often work with asbestos products while working for the State – a couple of times a year, but not a regular thing.

- (iii) The Deceased also gave evidence that he worked at 6 stations and did repair works to the roof and the signal boxes once or twice a year when required, but for no more than 2 days on each occasion.
- (iv) Some of the roofs were corrugated iron roofs and not asbestos.
- (v) The Deceased identified Super 6 when repairing the signal boxes and Tilux.
- (vi) Amaca should be placed in Category 1, as should Seltsam, whereas the State should be placed in Category 2.
- (vii) Effectively there were two periods of exposure, namely:
 - (a) 1948 to 1955 and 971 (when the Deceased was self-employed doing home renovations or construction); and
 - (b) Between 1955 and 1988 when the Deceased was employed by the State.
- (viii) The self-employed period of exposure falls in periods A, B and C.
- (ix) The railway exposure falls into periods A, B and C.
- (x) In respect of period A, Amaca is responsible for 75%, State for 25%, in period B Amaca is responsible for 65%, State for 35% and in period C Amaca is responsible for 60% and State for 40%.
- (xi) In the absence of evidence as to the causative effect of each exposure, the State submits that a differential determination should be self-employed period 70%, Railway exposure 30%.
- (xii) Applying the appropriate apportionment periods and the presumptions leads to the State being responsible for 10% whereas Amaca is responsible for 90%.
- (xiii) No submission was made by the State as to a break up between Amaca and Seltsam.

16. Amaca filed a Reply on 27 July 2010 which, so far as is relevant, submits:

- (i) Amaca should be placed in Category 1 and State of New South Wales should be placed in Categories 1 and 2.
- (ii) The Contributions Assessment should be varied in relation to the State of New South Wales, given the size and sophistication of the State of New South Wales.
- (iii) Disputes Seltsam's position not being obliged to contribute to any settlement because it was joined at a time after the matter was removed from the CRP.

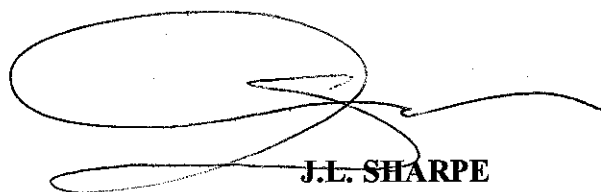
- (iv) The Deceased's exposure during his employment with the State Rail Authority was *de minimus* and did not make a material contribution to the Deceased's condition.
 - (v) In support of its Defence, Amaca provides a statement by Kenneth Frederick Pickering, which suggests that Godfreys was a very large Wunderlich distributor and, prior to the mid-1970s, was exclusively a Wunderlich supplier and that Amaca did not stock any of its products in the store prior to the mid-1970s.
 - (vi) Another document annexed to the Reply is a statement by Lloyd Douglas Godfrey, which asserted that all asbestos containing products were purchased from Wunderlich.
 - (vii) Attached as Part C to the matter is the transcript of evidence taken on 12 June 2010 which relevantly provided that:
 - (a) While performing work on Housing Commission properties the Deceased remembered the name James Hardie being used;
 - (b) Super 6 was the name of the corrugated sheeting used.
17. It is clear from the material placed before me that the Deceased's primary position is that he was always exposed to Amaca's products, and indeed names products which can be no-one else's product. The difficulty that arises is the nominating of a particular supplier and the suggestion made by Amaca that that supplier until 1975 did not stock directly Amaca's products. Against that argument is the fact that the Plaintiff nominated Tilux and SuperSix, which clearly is one of Amaca's products.
18. Seltsam Pty Ltd takes the view that it is not proper for it to participate in this contribution assessment by reason of the non-compliance with the provisions relating to contributions assessments, although it is to be noted that the Tribunal made an order on 19 July 2010 specifically allowing the filing of the Cross-Claim.
19. It seems to me that by reason of the order of the Court, the determination of apportionment became operative and accordingly Seltsam was placed in the position of, if it so wanted to, having to provide a Reply, which it has not done. Accordingly, this contributions assessment has continued on the basis of the material that was placed before me by the parties.

20. Initially the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole each separate period bears, having regard to the number of such periods, the length of each period, the duration of and the intensity of exposure to asbestos present in each such period. It is thus not appropriate to determine the relative contribution simply on the basis of the lapsed years between the various periods of exposure.
21. Based on the material available to me, I determine the contribution between the two periods to be:
- (i) 1948-1955 and 1971 while the Deceased was self-employed or employed doing home renovations and construction; and
 - (ii) 1955-1988 when the Deceased was employed by the State Railways.
22. In respect of the first period, the only Defendants to which this period relates are Amaca and Seltsam. The Plaintiff asserts that Amaca was the supplier, manufacturer and distributor of the asbestos products with which he worked. Amaca asserts that the products must have been Seltsam's products because of the places from which the asbestos products may have been purchased. In the circumstances, and solely upon the material properly before me, I determine that both Amaca and Seltsam are equally liable, and that the Deceased's exposure during this period amounts to 70% of his total exposure to asbestos dust and fibre.
23. In respect of the second period, the Defendants to which this can relate are State of New South Wales and Amaca. I determine that that the Deceased's exposure during this period amounts to 30% of his total exposure to asbestos dust and fibre.
24. Notwithstanding the submissions made by Amaca, I determine on the basis of the Statement of Particulars and the Replies that Amaca falls into Category 1 and State of New South Wales only falls into Category 2.

25. In the present case, the standard presumptions take into account the various aspects of the liability of Amaca, the State of New South Wales and Seltsam and, accordingly, there should be no variation in the standard presumption.
26. In relation to the first period, I determine that the relevant contribution by Amaca and Seltsam be in the order of 50% for Seltsam and 50% for Amaca.
27. In relation to the Second Period, I determine that by applying the Standard Presumptions, and rounding the contributions up, that Amaca is liable for 70% of the exposure during this period, and State of New South Wales is liable for 10% of the exposure during this period.
28. I therefore make the following calculations:
- (a) Amaca – 35% [first period] + 20% [second period]= 55%
 - (b) State of New South Wales – 10% [second period]
 - (c) Seltsam – 35% [first period]
29. Therefore, I determine the total liability of the Defendants and Cross-Defendant as follows:

Amaca	55%
State of New South Wales	10%
Seltsam	35%
Total	100%

30. Pursuant to clause 61 of the Regulations, I appoint Amaca as the Single Claims Manager as it is the primary defendant defined under clause 61(9).



J.L. SHARPE

2 August 2010