

IN THE DUST DISEASES TRIBUNAL
OF NEW SOUTH WALES

DDT No. 254 of 2009

BETWEEN:

RAYMOND VALENTINE KING
Plaintiff

WILGROUP PTY LIMITED
First Defendant

NEWCASTLE CHEMICAL CO PTY LIMITED
Second Defendant

WALLABY GRIP LIMITED
Third Defendant

TELSTRA CORPORATION LIMITED
Fourth 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* ("the Regulations") for a determination of apportionment as between the Defendants.
2. Regulation 49 provides, so far as is relevant, that I am to determine the contribution that each Defendant is to make and to make such determination on the assumption that the Defendants are liable. Such determination is to be made solely on the basis of the Statements of Particulars, Replies and the Standard Presumptions as to apportionment.
3. The Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (hereinafter referred to as "the Standard Presumptions Order") provides that apportionment is to be in accordance with the Table set forth in paragraph 5(1) of the Standard Presumptions Order.

4. In the present matter, the Plaintiff issued a Statement of Claim on 3 September 2009 and, so far as is relevant, alleges that:

- (i) Between 1949 and 1952 he was employed by Wilgroup Pty Ltd (hereinafter referred to as "Wormald").
- (ii) At all material times Newcastle Chemical Co Pty Ltd (hereinafter referred to as "Newcastle").
- (iii) Between 1956 and 1960 he was employed by the Postmaster General's Department (hereinafter referred to as "Telstra") at Newcastle as a technical assistant.
- (iv) Bell's Asbestos & Engineering (Aust) Ltd (hereinafter referred to as "Telstra") employed the Plaintiff as a storeman.
- (v) In the course of his employment with the Defendants, the Plaintiff was exposed to asbestos dust and material.
- (vi) The Plaintiff suffers from asbestosis and an asbestos-related condition.

5. In support of his claim the Plaintiff filed a Statement of Particulars on 7 September 2009 which, so far as is relevant, provides:

- (i) Between 1949 and 1952 the Plaintiff was employed by Wormald as a pipe fitter and was exposed to asbestos dust and fibre.
- (ii) Between 1952 and 1955 the Plaintiff was employed by Newcastle as a labourer and was exposed to asbestos dust and fibre.
- (iii) Between 1956 and 1960 the Plaintiff was employed by Telstra as a technical assistant and was exposed to asbestos dust and fibre.
- (iv) Between 1963 and 1964 the Plaintiff was employed by Wallaby Grip as a storeman and was exposed to asbestos.
- (v) Between 1975 and 1979 the Plaintiff was employed by Telstra and was exposed to asbestos
- (vi) The Plaintiff estimates his exposure in the following proportions:
 - (a) Wormald – 5%.
 - (b) Newcastle – 25%.
 - (c) PMG – 15%.
 - (d) Wallaby Grip – 35%.

- (e) Telecom – 15%.
- (f) Other employment – 5%.

6. The Plaintiff refers to a document signed on 23 February 2009 being 18 pages in length as being annexed to the Statement of Particulars, but no such annexure was included with the Statement of Particulars as filed.
7. It can be seen from the above that
 - (i) There is a degree of uncertainty as to the periods of the Plaintiff's employment;
 - (ii) There is a degree of uncertainty as to the level and intensity of any exposure to asbestos in the course of such employment;
 - (iii) That there were two separate periods of employment with Telstra;
 - (iv) The Plaintiff's condition is a divisible condition.
8. On 30 November 2009 Wormald filed a Reply which, so far as is relevant, alleges as follows:
 - (i) Denial of employment.
 - (ii) Lack of information from Plaintiff as to premises where Plaintiff worked so as to identify any possible exposure.
 - (iii) Wilgroup should be placed in Category 2 and Newcastle should be placed in Category 2.
 - (iv) Wallaby Grip should be placed in Category 1 and Telstra should be placed in Category 2.
 - (v) The Standard Presumptions should be varied by means of reduction of the maximum amount in respect of Wormald.
9. Newcastle has not put on any Reply.
10. Wallaby Grip filed a Reply on 31 January 2010 and amended that on 24 February 2010 and, so far as is relevant, alleges as follows:
 - (i) Wallaby Grip does not know if it employed the Plaintiff as alleged.

- (ii) Wormald, Newcastle and Wallaby Grip should be placed in Category 2 as each of the Defendants is only alleged to have employed the Plaintiff. Similarly, Telstra should be categorised as Category 2.
- (iii) Wallaby Grip submits that the standard presumptions should not be varied.
- (iv) Since there is an empty chair period, the contributions assessment should include the empty chair period.
- (v) A medical report has been obtained by Wallaby Grip from Dr Johnson dated 12 February 2010 which records a relevant history as follows:
 - (a) 1949-1952 Wormald, the Plaintiff worked in the Newcastle area installing fire protection in buildings. He had regular exposure to asbestos during this period to asbestos insulation, which was over the pipes upon which he was working. Other persons already applied lagging to the pipes to the pipes.
 - (b) 1952-1955 Employed by Newcastle Chemical Works where he operated a machine, which made chemicals. There was exposure to mercury and asbestos. There was asbestos lagging on boilers and steam pipes and the building was an asbestos fibro cement building. He recalls exposure to asbestos that was in place or maintained by others.
 - (c) 1956-1960 Postmaster General's Department as a technical assistant while installing telephone lines and machinery in houses and other buildings. The Plaintiff was required to drill asbestos fibro cement frequently.
 - (d) Between 1963 and 1964 employed by Bell's Asbestos at Hamilton where he worked as a storeman handling asbestos products every day including raw asbestos in bags, lagging, gaskets and rope. The Plaintiff had daily exposure to asbestos.
 - (e) 1975-1979 Employed by Telecom Australia as an installer-technician which involved installing telephone lines and material and equipment and had to drill asbestos fibro cement.

11. On 28 January 2010 Telstra filed a reply which, so far as is relevant, alleges as follows:

- (i) Wormald, Newcastle and Telstra should each be placed in Category 2 while Wallaby Grip should be in Categories 1 and 2.
- (ii) A "broad brush" approach should be adopted to arrive at an apportionment that is just and equitable between the Defendants.

- (iii) The Plaintiff's estimates of apportionment are reasonable.
- (iv) Telstra disputes employment in respect of the first period 1956-1960 (subject to documentary proof).
- (v) In support of its position, Telstra enclosed a report of Professor Breslin dated 17 January 2010 which, so far as is relevant, included the following history:

- (a) 1949-1952 Employed by Wormald in fire prevention as a pipe fitter. He was basically installing fire extinguisher systems and regularly put on asbestos bandages as part of the installation.

- (b) 1952-1955 Employed by Newcastle Chemical Company, Newcastle as a labourer. The factory had an asbestos cement corrugated roof and he painted this over several weeks and needed to brush it down first to prepare it for painting.

- (c) 1956-1960 Employed by the Postmaster General's Department in Newcastle as a technical assistant working in telephone exchanges and also on occasions ran wires through asbestos cement sheets, having to drill the sheets first to run the wires through.

- (d) 1963-1964 Employed by Bell's Asbestos as a storeman. Here he worked with asbestos in bags handling these bags every day for stacking and preparing them to be delivered elsewhere.

- (e) 1975-1979 Employed by Telecom at Hamilton installing phones in various premises. There was occasion drilling through asbestos cement sheets to run the wires. There was also occasional backhoe work with the use of plastic pipes running into asbestos cement pits and his work was in the street and often had to break a hole into the asbestos cement pits to run wires and there was some asbestos exposure in this work.

12. I understand my role as a Contributions Assessor to be that I must determine the contribution of each of the Defendants and no other party and that, accordingly, the contribution Assessment that I make is in respect of the liability of each of the Defendants which of course can only relate to a contribution towards the quantum that the Plaintiff could recover against all of the Defendants in the present action (in this 95% of his possible total damages).

13. In the present case, I determine that each of the Defendants is a Category 2 Defendant. While it is true that Wallaby Grip in certain circumstances acted as a Category 1 Defendant, from the

information before me having regard to the work performed by the Plaintiff for Wallaby Grip, the work performed by Wallaby Grip was in the nature of a Category 2 Defendant rather than a Category 1 Defendant. However, since all of the employment periods are separate periods of employment with no overlapping Defendant, there is no need to apportion in respect of the same periods of exposure, and thus the Standard Presumptions do not need to be visited.

14. 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.
15. I determine the periods of exposure are as follows:

Wormald	3 years
Newcastle	3 years
Telstra (first period)	4 years
Wallaby Grip	2 years
Telstra second period	4 years

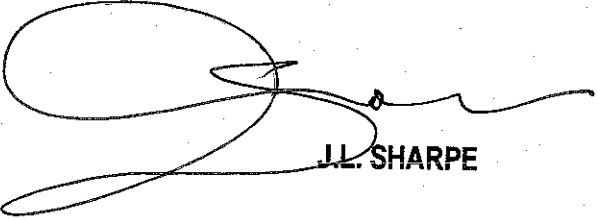
16. Based upon the material available to me, I determine the contribution between the various periods as follows:

Wormald	5%
Newcastle	25%
Wallaby Grip	35%
Telecom	30%
Other employment	5%

17. Thus, the following calculation as to liability can be made, and rounding the figures off, I make the following determinations:

Wormald – [5% ÷ 95% x 100%]	5.25%
Newcastle – [25% ÷ 95% x 100%]	26.30%
Wallaby Grip – [35% ÷ 95% x 100%]	36.85%
Telstra – [30% ÷ 95% x 100%]	31.60%

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



J.L. SHARPE

15 March 2010