

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

DDT No. 8011 of 2008

BETWEEN:

STEPHEN DENNIS KYLE
Plaintiff

AND

AMACA PTY LTD
First Defendant

AND

SELTSAM PTY LTD
Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 27 June 2008 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants. I have also been asked to appoint a Single Claims Manager for the claim.
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**).

3. The plaintiff, Stephen Dennis Kyle, has filed a Statement of Particulars describing his history of exposure to asbestos. He is by profession a trained builder and worked in rural New South Wales between 1962 and the late 1980s constructing homes which commonly involved using asbestos cement sheeting products.
4. His first exposure to asbestos was as a 12 or 13 year old working as an assistant or dogsbody for his father. His father was a builder who worked around the Nambucca Valley and used asbestos cement sheeting in constructing homes. Asbestos cement sheeting was used as external cladding, for eaves, Tilux was used in bathrooms and "Super Six" was used on the roof.
5. Mr Kyle's exposure to asbestos dust came when he handled, cut, rasped and cleaned the AC sheets. He was also required to clean up the site at the end of the day and transfer any off cuts or broken pieces onto a truck for removal. He describes that as dusty work.
6. In 1964 or 1965 Mr Kyle was formally apprenticed to his father. The work in the first year as an apprentice was largely the same as that undertaken when he worked as a dogsbody. In his second year as an apprentice he used a Black & Decker electric saw with a masonry fitting. He describes clouds of dust emanating from the power saw.
7. Mr Kyle's apprenticeship finished in about 1968.
8. He then worked with ac sheeting products working in a business with his father in the Gosford region building homes as a subcontractor. He recalls fibro being used in wet areas such as the laundry and bathroom and on decks and balcony floors. He did sub-contract work for Risedeck and Victor Homes.

9. In years later in the 1970s he worked as a sole trader in the building industry on the Central Coast. He recalls working extensively with ac sheeting products.

10. Mr Kyle identifies the following products he used by trade name:

(a) Super Six

(b) Tilux

(c) Hardiplank

11. Amaca and Seltsam manufactured and supplied ac sheeting products under the James Hardie and Wunderlich trade names respectively.

12. As to the quantum of his exposure Mr Kyle states in his Statement of Particulars:

"I used both Wunderlich and Hardies' fibro products. I found the Wunderlich product was of inferior quality and stopped using it. I used to ask for Hardies. The overwhelming majority of the fibro I used was manufactured by James Hardie. I would say that I used more than 90% Hardies' fibro product and less than 10% Wunderlich fibro product".

13. The plaintiff's career estimate of his exposure to asbestos is very instructive. He is singularly in the position to best estimate that figure.

14. Mr Kyle has been diagnosed with asbestosis – a divisible disease.

15. Both Amaca and Seltsam submit that they are each Category 1 defendants. There are no category 2 defendants in this case.

16. The Standard Presumptions provide in Clause 5(4) that if there is more than one defendant in either category 1 and category 2, I am to treat each

defendant as equal in contribution to the percent share of that category unless satisfied that a variable contribution ought to apply. That is the nub of the difference in the Replies filed by each of Amaca and Seltsam.

17. Amaca submits that as both parties are category 1 defendants the apportionment should be divided equally (Reply ¶ 8.5):

Amaca	50%
Seltsam	50%

18. Seltsam takes a different view. It submits that:

“..in respect of this claim the standard presumptions do not apply because there are only category 1 defendants”: Reply 8.2.

19. I do not accept that the Standard Presumptions have no application where there are only 2 category 1 defendants. The table in Clause 5(1) of the Standard Presumptions is directed at taking into account the relative state of knowledge of category 2 defendants as against category 1 defendants over the period 1 January 1961 to post January 1990. As category 1 defendants are presumed to have actual knowledge there is no utility in using that table to consider a variation in the application of the Standard Presumptions as between the current defendants.

20. In my view where there is clear evidence from the plaintiff regarding his estimate of his lifetime exposure to asbestos as between the defendants it is appropriate to apply a variable contribution in accordance with Clause 5(4). Put another way, it would be artificial to apportion Mr Kyle’s liability equally as between Amaca and Seltsam where his estimate is that more than 90% of his exposure was to Amaca products.

21. I am fortified in that view by the fact that Mr Kyle suffers from a divisible disease. In the circumstances I am satisfied that where 10% of his career exposure was to Seltsam products, with no distinction as to any given period in time, it is appropriate to apportion 90% to Amaca and 10% to Seltsam.

22. I appoint Amaca as the Single Claims Manager in accordance with CI 61(5) of the Dust Diseases Tribunal Regulations.

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David Jay
Contributions Assessor
3 July 2008