

CONTRIBUTIONS ASSESSMENT

DETERMINATION

IN THE DUST DISEASES TRIBUNAL OF NEW SOUTH WALES

TITLE OF PROCEEDINGS

Plaintiff	JANE FRANCES MORRIS (AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ALEXANDER CHARLES PARNEMANN)
First Defendant	AMACA PTY LIMITED (FORMERLY JAMES HARDIE & COY PTY LIMITED)
Second Defendant	SELTSAM PTY LIMITED

Case No. DDT00190/2004

A INTRODUCTION

1. On the 19th October 2009 the Registrar of the Dust Diseases Tribunal referred this matter to me pursuant to Regulation 49(1) of the Dust Diseases Tribunal Regulation 2007 for the determination of the contribution that each Defendant is to make to the Plaintiff's claim.
2. The Plaintiff has sued two Defendants. The identity and status of each of the Defendants is as follows.
 - i. The First Defendant, Amaca Pty Limited, has filed a Reply (1DR).
 - ii. The Second Defendant, Seltsam Pty Limited, has filed a Reply (2DR).

3. In this Determination I shall refer to the Plaintiff's Statement of Particulars filed on the 24th April 2009 as PSP. The Particulars were lodged with the Tribunal almost four years after the death of the late Alexander Charles Parnemann. Attached to the Particulars is a statement of the now deceased Plaintiff signed on the 19th April 2005. I shall refer to this statement and any particular paragraph of it as PS with a relevant number following thereafter.

B. PRELIMINARY DETERMINATION

4. I am required by DDTREG 49(4) to:

"... determine the contribution that each defendant is liable to make and is to make that determination on the assumption that the defendants are liable and solely on the basis of:-

- (a) the plaintiff's statement of particulars and the defendants' replies on the claim, and*
- (b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the Gazette" [emphasis added].*

5. There is no dispute that at all material times both Defendants were manufacturers and suppliers of asbestos building products. Each is a Category 1 Defendant.
6. The First Defendant contends that in accordance with Clause 5(4) of the Standard Presumptions, that as there are two Category 1 Defendants, each Defendant should make an equal contribution to the relevant percentage share of that Defendant Category. In support of its position, the First Defendant relies upon a letter of particulars dated 11th November 2004 addressed to the First Defendant's solicitor from the Plaintiff's solicitor. The letter of the 11th November 2004 from the Plaintiff's solicitor supplying particulars is annexed to 1DR.
7. The Second Defendant contends in accordance with Clause 5(4) that a variable contribution ought apply and submits that the apportionment should be weighted with 87.5% attributed to the First Defendant, and 12.5% to the Second Defendant. In support

of its submission, the Second Defendant relies upon the statement of the late Alexander Charles Parnemann (PS) dated the 19th April 2005 annexed to the PSP.

8. Neither Defendant has made any submission, nor included within its Reply, documents relevant to market share or distribution outlets within the relevant time period and geographical area in which the deceased Plaintiff worked as a carpenter and was exposed to asbestos dust and fibre.
9. Central to the determination of any variation that should apply under Clause 5(4) is which of the ostensibly conflicting statements of the deceased Plaintiff should be relied upon.

C. THE PLAINTIFF'S EVIDENCE

10. The deceased Plaintiff was born on the 27th March 1929. On the 26th March 1945 he commenced his apprenticeship as a carpenter with a builder G R Kerven. He stayed with this employer until sometime in about mid 1950. Thereafter for approximately five years, he worked for a series of employers throughout Queensland and New Guinea carrying out work as a carpenter. During each of these periods he was regularly required to work with asbestos building products and was exposed to asbestos. From about mid 1955 through to 1971 the Plaintiff was a sub-contract carpenter. His major client during this period was a building company called Sullivan Homes.
11. At paragraph 8.9 1DR, the First Defendant repeats questions posed by the First Defendant's solicitor to the Plaintiff's solicitors which resulted in the letter supplying particulars of the 11th November 2004. Question 15 of the request was in the following terms:-

"Overall, what proportion of the asbestos dust and fibre to which the Plaintiff was exposed came from:-

(a) products manufactured and/or supplied by Amaca;

(b) products manufactured and/or supplied by Wallaby Group;

(c) products manufactured and or supplied by Seltsam;

(d) products manufactured and/or supplied by others identifying whom"

12. The answer supplied was unqualified, identifying that 50% of the contribution was made by the First Defendant, and an equal amount by the Second Defendant.

13. The answer to question 15 was reinforced by the following two sentences:-

"The Plaintiff used considerable quantities of both Hardies and Wunderlich products throughout his career and specifically recalls using both products. He does not put his use of one manufacturer's products at any greater than the other".

14. At paragraph 18 of the letter dated 11th November 2004 the Plaintiff attributes approximately 90% of his total exposure to asbestos cement flatsheets with the balance being attributable to exposure to Super Six or Deep Six products manufactured by both Defendants. The answer to this question is completed by the following sentence:-

"The Plaintiff attributes 10% of his life time exposure to these sheets distributed more or less equally between the Defendants".

15. I infer for the purpose of my Determination that these replies to the First Defendant's request for further and better particulars were made on instructions from the deceased Plaintiff.

16. Approximately five weeks after the date of the letter supplying particulars, the deceased Plaintiff was examined at the request of his solicitor by Dr Roger Allen. In his report of the 14th December 2004 annexed to the PSP, Dr Allen describes the deceased Plaintiff's presentation as follows:-

"On examination, he was a frail elderly man who was mentally alert with good cognitive function. He had a hearing aid in his right ear. He weighed 69.5 kg..... compared to 75 kg in January 2004".

17. I infer from this evidentiary information that at the time the late Mr Parnemann gave instructions to his solicitors to provide further and better particulars, he was not suffering with any form of cognitive impairment, and was mentally alert.

18. The Second Defendant relies upon the PS attached to the PSP. As a generalisation, paragraphs 1 - 8 are similar in content to the letter of particulars, other than an omission to mention Deep Six when describing corrugated roof sheet exposure, and a further

recollection of Tilux as a product of which the late Mr Parnemann was aware. At PS9 however, whereas he was previously clear in his recollection or impression of the proportions of products from the First and Second Defendants with which he worked, that clarity of impression or recollection does not appear in this paragraph.

19. PS10 - 13 deal with the deceased's Plaintiff recollection of his exposure history in the five year period between 1950 and 1955 whilst employed by various builders. Apart from confirming that the majority of his exposure was with flatsheet fibro, the deceased Plaintiff does not give any indication as to the manufacturer of the relevant asbestos flatsheets.
20. A significant difference occurs in paragraphs 14 through 18 of the deceased Plaintiff's statement referable to the period 1955 to 1971 whilst working as a sub-contract carpenter with Sullivan Homes. In stark contradiction to his letter of particulars, at PS17 the deceased Plaintiff states:-

*"To the best of my knowledge I believe that all of the products we use(d)
(sic) while working for Sullivan Homes were Hardie's products".*

21. In this section of the PS, other specific Hardie's products are identified. PS18 gives a clear description of an incident involving the deceased Plaintiff and a fellow worker whom is identified in relation to an episode involving the use of Hardie plank sheets. PS15 identifies the dusty characteristics of compressed sheeting.
22. The Regulation (Clause 29) acknowledges that a full recall of events occurring 40 or 50 years prior may not occur instantly on request or at the same time.
23. I accept that the PS was prepared on instructions provided by the deceased Plaintiff to his solicitor, who was in fact the author of the earlier letter of further and better particulars.
24. The circumstances in which the Plaintiff acknowledged and signed his statement however must be considered. Twelve days after signing his statement, the deceased Plaintiff passed away. An autopsy examination was carried out on the 4th May 2005. The relevant autopsy report of Dr G Lampe dated 22nd June 2005 is annexed to the PSP. The Plaintiff's body is described as being that of a *"somewhat emaciated Caucasian male"* with a *"body weight of 47 kilograms"*. Over a period of four and a half months the Plaintiff's weight had dropped approximately by 22 kilograms, or by almost a third of his total body weight. The cause of death was attributed to Pulmonary Fibrosis as a consequence of asbestos and silica exposure, with other significant conditions being *"Ischaemic Heart Disease, Cerebral Atrophy and Morphine Administration"*. It is recorded by the examiner

that the Plaintiff's condition had deteriorated over the two weeks prior to his death. The medication list from the Plaintiff's medical record indicated a frequent administration of morphine between the 20th April 2005 and 1st May 2005.

25. The deceased Plaintiff's statement is a six page document. It is signed at the base of each page, presumably by the present Plaintiff, Jane Frances Morris. A signature, ostensibly that of the deceased Plaintiff, is only on the final page of the statement.
26. I infer from the autopsy report and the references contained therein to the Plaintiff's deteriorating medical condition, that in the period his statement was prepared and signed, the deceased Plaintiff was, during this period, experiencing significant pain, had become exceedingly frail, and was labouring under the effects of Ischaemic Heart Disease, Respiratory Impairment, and Cerebral Atrophy.
27. I have drawn an inference that at the time instructions were provided for the provision of further and better particulars, the late Mr Parnemann was mentally alert and not labouring under any cognitive impairment discernable by a specialist medical practitioner. His recollection and acuity were ostensibly unimpaired.
28. I cannot assume the context in which the Plaintiff provided his instructions for his statement of April 2005, other than for the medical circumstances, to which I have alluded. I am not aware as to whether the statement was provided at interview in answer to leading questions, or by way of the Plaintiff volunteering specific details. What however is clear is that in his statement, the Plaintiff does refer to a specific incident in PS18, and at PS15 recalls and identifies additional dusty products namely compressed sheeting which he had not specified in his letter of further and better particulars. This level of detail persuades me that these statements should be relied upon.
29. I determine however, that the weight that I can give to the statement of the 19th April 2005 is less than that which I place upon the letter of further and better particulars, subject however to the two specific circumstances of additional exposure referred to in PS15 and PS18, identifying additional products and defining exposure circumstances. The Plaintiff's estimation of a division of total attributability from his life-long exposure to asbestos, provided 60 years after such exposure commenced, and 34 years after it ceased, can only be a matter of impression.
30. Whereas the Plaintiff's cognitively unaffected impression of an equal distribution of product usage between the First and Second Defendant is the more compelling, I am of the view that the isolated references which appear of a more specific character at PS15

and PS18, persuade me that a variation ought be applied. Such variation reflects the marginal significance which I place upon the selected contents of the PS.

31. There is in my view, one period of exposure only dating from March 1945 through to 1971. During the entire period both Defendants manufactured and supplied asbestos cement building products. For the reasons set out above, I vary the equal apportionment between the two Category 1 Defendants as follows:-

Amaca Pty Limited	60%
Seltsam Pty Limited	40%

32. In accordance with Clause 61(3)(b) of the Regulations, I appoint Amaca Pty Limited as the Single Claims Manager.

Dated 27th November 2009



Richard Buckley
Contributions Assessor