

**DUST DISEASES TRIBUNAL AMENDMENT (CLAIMS RESOLUTION)
ACT 2005 section 42**

DDT No 8234 of 2008

Between

CATHERINE MARY O'FARRELL (AS LEGAL PERSONAL REPRESENTATIVE OF THE
ESTATE OF THE LATE ROBERT ALLEN WALLIN)
Plaintiff

CLARKE BROS. (ST MARYS) PTY LIMITED
First Defendant (Discontinued 01/03/10)

3M AUSTRALIA PTY LIMITED
Second Defendant

RICOH AUSTRALIA PTY LIMITED
Third Defendant

DETERMINATION OF APPORTIONMENT

The proceedings have been referred to me by the Registrar of the Dust Diseases Tribunal for the purpose of a Contributions Assessment, such reference having been made under clause 49(1) of the Dust Diseases Tribunal Regulation 2007.

Short Minutes of Order were filed in the Tribunal on 15 March 2010 stating that the parties were to agree apportionment prior to 14 May 2010. The file was referred to me on 18 May and at that point replies from all Defendants had not been received. I have subsequently received further submissions from both the First and Second Defendants through their solicitors.

I note that handwritten amendments to the Short Minutes of Order direct that my attention consider submissions made on behalf of the parties in making my determination. I further note that a Form 1 Statement of Particulars has not been filed but that an affidavit of the deceased dated 30 June 2008 was filed on 18 November 2008 and in the absence of a Statement of Particulars, I have had regard to that document.

The Plaintiff's cause of action arises by allegations made by the deceased, Robert Alan Wallin, that he was exposed to asbestos dust and fibre whilst working for Clark Brothers (St. Mary's) Pty Limited as an Electrical Mechanic, having commenced on 22 April 1968. The deceased passed away as a consequence of his mesothelioma on 29 August 2008. The Plaintiff filed a Further Amended Statement of Claim with leave on 1 March 2010 substituting the Plaintiff as the Legal Personal Representative of the estate of her husband.

The deceased swore an affidavit on 30 June 2008, and therein deposed that Clark Brothers were a substantial business in the St. Mary's area and had contracts with AV Jennings to do the wiring in new cottages that had been built by Jennings. He deposes to having done a lot of cottage work during the period that he was with them, which also involved him drilling through the eaves that were made of fibro flat sheet and also the lower half of bathroom walls which were made from fibro sheets. He further states all the wet areas used fibro and it was common to also strike fibro in the laundry and toilet areas (see paragraph 15).

He then at paragraph 17 deposes to working in a different division of Clarks, which was a division that did work in government buildings, primary schools, hospitals, telephone exchanges and office buildings, and he details there some of the premises upon which he performed such work.

At paragraph 18 of his Affidavit he details exposure to asbestos dust and fibre from fibro sheeting when working on the schools as he was scraping and drilling through the ceilings to attach light fittings. He alleges at paragraph 18 that he attached thousands of light fittings throughout this period and states;

"I was covered by fine white dust from scraping and drilling ceilings in order to attach light fittings. Both vermiculite and asbestos were used as fire proofing agents at the time. I am not sure of what was used in the schools but I know that both were used."

He then at paragraph 19 details having been sent to the 3M factory at St. Mary's where a lot of maintenance work was being performed in which he was involved.

The deceased states at paragraph 20 that towards the end of his period with Clarks he worked on the 3M site full time and that many of the buildings were old and that the rooves were made from corrugated asbestos cement sheets which he worked on from time to time.

The deceased then states at paragraph 25 that on 5 October 1971 he commenced work with 3M Australia as a Maintenance Electrician and worked for the company at their St. Mary's site until 1 February 1974 where he did a mixture of maintenance and insulation work. He alleges at paragraph 27 he continued to be exposed to asbestos at 3M, some of the exposure having occurred from raw asbestos and further stating;

"The atmosphere in the compounding rooms was full of dust all the time."

He further details at paragraph 28 that the 3M factory had a corrugated asbestos cement roof and fibro walls, and at paragraph 29 that he came in contact with asbestos lagging materials which were kept in the store for carrying out repairs on the steam lines. He states that he also saw and worked with asbestos rope and flat asbestos tape and thus had additional exposure to the rope and tape whilst working at 3M.

The deceased then details further employment with other entities who are not a party to these proceedings. At paragraph 36 refers to his employment with Nashua Australia Pty Limited (now known as Ricoh) where he worked as a Maintenance Electrician. He states at paragraph 37 of his Affidavit that there was a lot of steam used at the plant because of the steam ovens and that, whilst he worked for Nashua, he pulled back and removed lagging in order to get flanges on steam pipes. He states;

"The lagging was asbestos rope and tape lagging. There was insulation used around the ovens. My memory is that the insulation was rock wool."

At paragraph 39 he details his period of employment with Nashua as between 1979 and 10 October 1985 and states that he was exposed to asbestos while working for Nashua. In October 1985 Nashua was sold to Visy and Mr. Wallan became an employee of Visyboard Paper Products Pty Limited. He believes he may have had some further exposure to asbestos dust while working for Visy.

In 1988 he then obtained employment with Simon Carves's Electrical Services again as an Electrician and does not believe he had any further exposure to asbestos.

The Plaintiff had originally commenced proceedings against Clark Brothers as First Defendant, 3M Australia as Second Defendant and Ricoh Australia Pty Limited as Third Defendant. Proceedings against Clark Brothers were discontinued and the contributions assessment to be performed by me is between 3M Australia and Ricoh.

Ricoh has filed three sets of submissions and I have had regard to all of those. In particular, their submissions suggest that the appropriate manner in which I ought apportion contribution was to:

- (i) assess the degree to which exposure in the course of each employment was causative of the mesothelioma;
- (ii) assess the degree to which the exposure occurred as relevant to the *Dust Diseases (Standard Presumptions - Apportionment) Order 2005* (and in particular the extent to which it was within period (b) as distinct from period (c); and
- (iii) apportion between the Defendants based on their categorisation as category 1 and/or category 2 Defendants.

Ricoh submits that, subsequent to the discontinuance of proceedings against Clark Brothers, 3M is now the sole party responsible for exposure in the Clark Brothers period and in the 3M periods of employment it must bear the entirety of the apportionment attributable to those employment periods.

It is further submitted by Ricoh that I ought categorise 3M as both a Category 1 and 2 defendant as they were not just an employer but an installer of asbestos. However it is conceded by both defendants that the periods of employment with each defendant fall within different periods and thus such determination in my view is unnecessary.

Ricoh further submit that the exposure with them was to asbestos rope and tape, and to rockwool which does not contain asbestos, and that thus his exposure was trivial or inconsequential.

The submissions on behalf of 3M concede that they employed the deceased between 5 October 1971 and 1 February 1974 and again from 23 March 1981 to 11 September 1981 – a period of less than 3 years. There is a further period alleged that the deceased was working at 3M for about 12 months whilst also working for Peter Defaweux. 3M submits at paragraph 4.5 that the period alleged against them equates to approximately 4.3 years, and that the period with Ricoh equates to approximately 6 years and that I should assess the contributions on a time on risk basis.

3M further submits that as a maintenance engineer the deceased's exposure would have involved more indirect exposure which would not have been very frequent.

The Plaintiff has not filed a Form 1 Statement of Particulars as is the usual requirement under the regulation. That requirement was rendered unnecessary by orders made by the Tribunal on 13 October 2008 removing the proceedings from the operation of the Dust Diseases Tribunal Regulation 2007. In the absence of the Form 1 Statement of Particulars, in my view, the only documents to which I ought have regard are the Affidavit of Mr. Wallan and the submissions made by the parties. I have also had regard to the Affidavit of Mr. Wallan's wife.

The defendants were unable to agree as to apportionment of liability and the matter was referred to me by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulations").

The determination I am required to make under Section 49(4) of the Regulations is made on the assumption that all of the defendants are liable. It is also 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."*

As previously noted, the Plaintiff has not filed a statement of particulars. I have had regard to the deceased's affidavit however as it seems to me that this was necessary to do justice between the parties as this is the only evidence as to the deceased's history. I have also had regard to the submissions made by the defendants in accordance with the orders of the Tribunal.

The standard presumptions are pursuant to the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 ('the Order')* which provides that the legal basis for the apportionment between joint tort-feasors is governed by section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*. I have had regard to the Standard Presumptions contained in section 5 of *the Order* and the Factual Considerations contained in section 3 of *the Order*.

The Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2005, Schedule 1, Clause 2 quotes from section 5 of the Law Reform (Miscellaneous Provisions) Act 1946 as the legal basis for the approach to apportionment.

Clause 2(2) of Schedule 1 of the Order is as follows:

(2) The phrase “responsibility for the damage” in section 5 (2) requires a comparison of the relative culpability of each tortfeasor in causing the damage. Alternatively put, the Court in making an apportionment is engaged in a consideration of the relative blameworthiness and causal potency of the negligence of each party. These contribution provisions have become notorious for the conceptual and practical difficulties they engender. In practical terms, in most cases a broad-brush approach is undertaken. The aim is to arrive at an apportionment which is “...just and equitable...”.

Doing the best I can it seem to me that the quantification of the exposure with 3M was approximately 3 hours per day, 20 days per month for 46 months = 2760 hours. At Ricoh I believe it is best quantified as ½ hour per day, 20 days per month for 72 months = 720 hours.

I therefore determine that the apportionment is as follows;

3M	80%
Ricoh	20%

WENDY STRATHDEE

Contributions Assessor

23 June 2010