

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

DDT No. 8292/ 2008

BETWEEN:

JOHN O'REILLY
Plaintiff

AND

SELTSAM PTY LIMITED
First Defendant

AMACA PTY LTD of LITIGATION GROUP MANAGEMENT
Second Defendant

**CGU INSURANCE LIMITD AS INSURER FOR PATNEY PTY LTD
(FORMERLY KELL & RIGBY PTY LTD)**
Third Defendant

MAX COOPER & SONS PTY LTD (IN LIQ)
Fourth Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. By letter dated 16 July 2009 I was appointed the Contributions Assessor by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**). I have been asked to appoint a Single Claims Manager.
2. Appearances and Replies have been filed for Seltsam Pty Ltd (**Seltsam**), Amaca Pty Ltd (**Amaca**) and CGU Insurance Ltd (**CGU**). No appearance or Reply has been filed for Max Cooper & Sons Pty Ltd (in liq) (**Max Cooper**).
3. 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* (**the Standard Presumptions**).

Mr O'Reilly's Claim

4. Mr O'Reilly alleges that he suffers asbestosis.
5. Mr O'Reilly recalls five periods of employment between 1950 and about 1988 when he believes he was exposed to asbestos in the workplace. Mr O'Reilly worked as a bricklayer and labourer throughout his career. He recalls being exposed to asbestos for a period of about 2 months in 1953 whilst working in the UK/Ireland. He worked in the vicinity of other workers who were spraying wet asbestos onto concrete piers. He was not involved with handling this material. He also recalled co-workers in Dublin working mixed loose asbestos with water to create a slurry. He did not work near these workmen.
6. He describes his exposure to asbestos in this period as "negligible and insignificant".
7. Mr O'Reilly states that he was employed by Kell & Rigby Pty Ltd as a bricklayer and labourer in the period 1960 - 1963. He states that "*throughout the whole of this period, I worked with and adjacent to workers using asbestos cement fibro products and asbestos slurry*". He did not use asbestos himself but worked in the vicinity of men who cut and shaped the asbestos sheets. He saw dust emanating from the sheets and worked within a 5 metre vicinity. He was not given protective a mask. He believes he was exposed to asbestos "*almost every day that I worked at Kell & Rigby Pty Ltd*". In this role workers on site mixed asbestos with water to create a slurry. Mr O'Reilly recollects that a large amount of asbestos rose into the air. He believes this occurred about 2 to 3 times per week during his employment. He estimates that about 70% of his exposure in this period was to Asbestos cement fibro products with the balance, 30%, to the other products.
8. Mr O'Reilly was next employed from 1963 – 1965 by Max Cooper. He states that he was exposed to asbestos cement fibro sheets, loose form asbestos powder, asbestos spray and asbestos slurry. He does not identify any material by product name or manufacturer. In respect of the AC sheets he states "*I understand that these were manufactured by the First and Second Defendants*". He estimates that about 80% of his exposure in this period was to Asbestos cement fibro products with the balance, 20%, to the other products.

9. Mr O'Reilly believes he worked on government building sites in this role, perhaps at Sydney University. He was not able to identify any other sites he worked at. His occupational exposure to asbestos was quite similar to that with Kell & Rigby. He worked in the vicinity of men who cut AC sheets as well as men creating the asbestos slurry.
10. He states that his level of exposure to asbestos "*was approximately the same level as at Kell & Rigby*". I would estimate this to be medium to high.
11. His next period of employment of employment was for the period 1965 – 1973 where he worked on residential constructions for various contractors in New South Wales and Queensland. Again, he worked as a bricklayer in the vicinity of co-workers who used asbestos. Those co-workers used handsaws and power saws to cut and install AC corrugated sheets and flat sheets, asbestos cement gutters, asbestos cement downpipes, ridge boards and ridge capping, and joint strips. He was exposed to asbestos "*on about 3 to 4 days per week during this period*".
12. He believes that the products he was exposed to were manufactured by Seltsam and Amaca.
13. His final period of exposure was in the Rockhampton region from 1973 – 1988. His exposure was largely identical to the previous period in duration and intensity.
14. In summary Mr O'Reilly estimated his lifetime exposure as follows:

Dublin, Ireland and London, UK – 1950 - 1959	2%
Kell & Rigby Pty Ltd – 1960 – 1963	30%
Max Cooper – 1963 – 1965	26%
Contractors in the NSW and QLD area – 1965 – 1973	21%
Contractors in the Rockhampton Area – 1973 – 1988	21%

The Defendants' Replies

15. Each of the Seltsam, Amaca and CGU have filed Replies. In this matter each of the defendants dispute the diagnosis of asbestosis. Professor Breslin has provided a

medical report in which he concludes, from the account of exposure given to him, Mr O'Reilly's exposure would not have reached 25 fibre/mL years and that he suffers interstitial lung disease but not asbestosis.

CGU

16. CGU relies on a report of Dr Michael Jones who concludes that Mr O'Reilly has emphysema. He also concludes that there is no evidence of pleural plaques or pleural calcification to indicate asbestos exposure.
17. CGU submits that none of Mr O'Reilly's versions of events should be accepted because there are so many inconsistent accounts given by him to medical practitioners, the Dust Diseases Board and in previous DDT proceedings.
18. In respect of the whole of the claim CGU also relies on defences based on delay in bringing the application (referring to *Batistatos v RTA (NSW)* [2006] HCA 27) and the absence of circumstances which make a claim based on s 601AG of the *Corporations Act 2001* applicable.
19. CGU submitted that it is not subject to the Standard Presumptions scheme and referred to a contributions assessment in the matter of *Labrum v Amaca* DDT No 94 of 2005. I addressed that argument in my contributions assessment in *Depasquale v Allianz* 20 August 2008 in the following terms:

"I reject the submission that I should follow the reasoning in *Labrum* and that Amaca should be solely responsible for the plaintiff's loss. I do so for the following reasons:

- (a) Clause 4(4) of the Standard Presumptions requires that, when determining apportionment, I must assume that all defendants are liable. Applying that principle I determine that the insurers are each liable.
- (b) Category 2 "includes all other defendants": Standard Presumptions Cl 5(2). The insurers are "other defendants".
- (c) The defendants have not agreed as between themselves that any of the defendants are not liable pursuant to Clause 5(2) of the Standard Presumptions. I note in quoting clause 5(2) of the Standard Presumptions in the fourth defendant's Reply the only words from the lengthy clause omitted were "(except for any defendant that is to be excluded from the apportionment, as agreed by the defendants)".

- (d) LifeSavers was Mr Depasquale's employer. It plainly falls into Category 2 and as the insurer of LifeSavers the Insurers are on risk in respect of their liabilities to Mr Depasquale. It is a small intellectual leap to take that as LifeSavers' insurer each of the Insurer defendants are responsible for that liability.
- (e) I was not referred to decisions contrary to Contributions Assessor Buckley's decision in *Labrum* including his decision in *Willard* (6008 of 2006) made approximately 3 months later in which he held that the liability of the insurer (in that case QBE) should reflect that of the deregistered employer. With respect I think the reasoning in *Willard* is plainly correct. It is in conformity with the decision of Contributions Assessor Sharpe in *Gibson* (6290 of 2006) and the multitude of decisions in which Comcare and WorkCover Queensland have been apportioned liability.
- (f) In circumstances where Clause 2(2) of the Standard Presumptions require that I make an apportionment that is "just and equitable" it would be plainly unjust and inequitable to apportion 100% of the liability to Amaca.

20. On that basis I find that CGU is a proper defendant and liable under the Standard Presumptions scheme.

21. CGU also referred to "difficulties arising under s 109 of the Commonwealth Constitution" if an apportionment order was made against it. It did not expand on that argument further. Unsurprisingly, I don't propose to address the merits of that argument here.

22. In respect of calculating apportionment CGU submitted that Mr O'Reilly's recollection of his asbestos exposure should be rejected. It noted in particular that the alleged exposure in Rockhampton being a total of 15 years must have resulted in a higher proportional exposure than the 3 year Kell & Rigby period. It submitted also that the exposure alleged in the Statement of Particulars was substantially different to the histories given to Professor Breslin and Bryant (ie 1 – 2 days per week).

23. It submitted that I should substantially adjust the percentages of lifetime exposure as follows:

- 1950 – 1959 – 10% for which 1 and 2D must be liable
- 1960-1963 – 5% for which 1, 2 and 3D must be liable
- 1963 – 1965 – 4% for which 1, 2 and 4D must be liable
- 1965 – 1973 – 27% for which 1 and 2D must be liable

1973 – 1988 – 54% for which 1 and 2D must be liable

I can't accept the first submission as the exposure occurred in Dublin and London and there is no evidence it was exposure to product supplied by Amaca or Seltsam.

Seltsam

24. In its Reply Seltsam did not admit that Mr O'Reilly suffers the condition alleged. It noted that none of its products were identified by name. It admitted that it manufactured cement fibro sheets and asbestos cement corrugated sheeting.
25. Seltsam submitted that its liability should be limited qua Amaca because it ceased manufacturing in July 1977 whereas Amaca ceased manufacturing in 1983. It submitted that any liability between Seltsam and Amaca should be split Amaca 62.5% and Seltsam 37.5%.

Amaca

26. Amaca did not admit that Mr O'Reilly suffers from asbestosis and referred to reports by Dr Jones and Dr Gardiner. In his report Dr Gardiner states that the history of asbestos exposure was not really sufficient to say he had asbestos exposure and then "*Many aspects of his alleged exposure I found improbable*". He diagnosed diffuse interstitial fibrosis.
27. Amaca submitted that the descriptions of the products he was alleged to have been exposed to is not sufficient to identify them as being manufactured by it. As against that I think it can be said with some certainty that Amaca did manufacture asbestos cement flat sheets. It submitted that any liability as between Seltsam and Amaca should be split 50/50.
28. In respect of the plaintiff's history of exposure Amaca submitted that a broad brush approach should be adopted. Assuming Mr O'Reilly's exposure was over 28 years it submitted that the liability should be allocated according to period on risk. I found its submissions in respect of Period B and Period C somewhat confusing. For instance in respect of Period B (1 Jan 1961 – 31 Dec 1978) it submitted:

Period B

This period accounts for 60.71% of the Plaintiff's total exposure.

<i>Amaca</i>	<i>19.73%</i>	<i>(65%x60.71/2)</i>
<i>Seltsam</i>	<i>19.73%</i>	<i>(65%x60.71/2)</i>
<i>Category 2 Defendants</i>	<i>21.25%</i>	<i>(35%x60.71)</i>

29. The difficulty I have with that is that there is no attempt to distinguish between Kell & Rigby or Max Cooper by reference to the years Mr O'Reilly was employed by them or his actual estimate of cumulative exposure during employment. I do not propose to apply Amaca's methodology.

Categorising the Defendants

30. Each of Seltsam, Amaca and CGU submitted that the defendants should be placed in the following categories:

Seltsam	Category 1
Amaca	Category 1
Max Cooper	Category 2
CGU (Kell & Rigby)	Category 2

31. I adopt those submissions.

32. I do not propose to vary the Standard Presumptions as there is no evidence that the Category 2 defendants had actual knowledge of the dangers of asbestos at the time of exposure or were so large and sophisticated that they should be fixed with knowledge beyond that of a generic Category 2 defendant.

The Standard Presumptions

33. Having regard to the Standard Presumptions the following factual considerations are noted by me:

- (a) Mr O'Reilly alleges that he suffers from asbestosis.
- (b) Asbestosis is a divisible condition.

- (c) His exposure to asbestos is said to have occurred over more than 30 years.
- (d) The lag time between his exposure and diagnosis is sufficient to be causative of the injury.
- (e) Exposure occurred in periods A, B and C of the Standard Presumptions.
- (f) None of his employers or the manufacturers took any steps to minimise the risks of exposure to asbestos.
- (g) There is alleged to be exposure in the period 1984 – 1989 when neither of the category 1 defendants supplied products.

34. I think there is substance to CGU's submission that much of Mr O'Reilly's evidence as to his history of exposure to asbestos is confusing and contradictory. Equally there is substance to the manufacturer's submission that he has not identified by name any of the products he is alleged to have been exposed to. Both of those circumstances make reaching a well informed determination difficult. Ultimately, however, resolving those factual contradictions is a matter for the DDT.

35. From my own perspective I find it inherently improbable that Mr O'Reilly was still being exposed to asbestos from AC sheets in 1988 when all manufacturing had ceased several years previously.

36. I am also troubled by Mr O'Reilly's estimate of his total exposure. It seems strange that he considers he was exposed to more asbestos in the Kell & Rigby period between 1960 and 1963 than in the Rockhampton period 1973 – 1988. Mr O'Reilly is the only person who can give actual evidence of his exposure and so I accept his estimate of his percentage of exposure in each role.

37. In the absence of clear identification of the products worked with by his co-workers I have assumed that the liability of the Category 1 defendants is 50/50 up until Seltsam ceased manufacturing.

38. Doing the best I can and adopting Mr O'Reilly's estimate of his total exposure for each period I make the following determination on apportionment:

Period	Portion of Total Exposure (Plaintiff's estimate)	Standard Apportionment – Clause 5.1	Category 2 defendants	Category 1 defendants
1950 – 1959	2%	75:25	N/A	2% (UK/Ireland exposure)
1960 - 1963 Kell & Rigby	30%	75:25 (1 Jan 1960 – 31 Dec 1960) 65:35 (post 1 Jan 1961)	Kell & Rigby $1/3(25\% \times 30\%) = 2.5\%$ $2/3(35\% \times 30\%) = 7\%$ Total 9.5%	Seltsam $1/3(50\% \times 75\% \times 30\%) + 2/3(50\% \times 65\% \times 30\%) = 3.75 + 6.5 = 10.25\%$ Amaca – 10.25%
1963 – 1965 Max Cooper	26%	65:35	Max Cooper $35\% \times 26\% = 9.1\%$	Seltsam $65\% \times 26\% \times 50\% = 8.45\%$ Amaca – 8.45%
1963 – 1973 Various contractors	21%	65:35	N/A	Seltsam – 10.5% Amaca – 10.5%
1973 – Jul 1977 Various contractors	21% x 4.5/15		N/A	Seltsam – 3.15% Amaca – 3.15%
Aug 1977 – 1988 Various contractors	21% x 10.5/15			Amaca – 14.7%
			18.6%	81.4%

39. In summary:

Amaca – $14.7\% + 3.15\% + 10.5\% + 8.45\% + 10.25\% = 47.05\%$

Seltsam – $3.15\% + 10.5\% + 8.45\% + 10.25\% = 32.35\%$

Kell & Rigby – 9.5%

Max Cooper – 9.1%

Non-party exposure – 2% = 2%

40. I have been asked to appoint a Single Claims Manager. In accordance with CI 61(4)

I appoint Amaca.

.....

David Jay

Contributions Assessor

22 July 2009