

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

DDT No. 15/09 and 15/09/01

BETWEEN:

STATE OF NEW SOUTH WALES
Plaintiff

AND

AMACA PTY LTD
First Defendant

WALLABY GRIP LTD
Second Defendant

KLINGER LTD (FORMERLY RICHARD KLINGER PTY LTD)
Cross Defendant to First Cross Claim

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. This matter was referred to me by Registrar Martin pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (**the Regulation**). The Registrar has requested that I also appoint a Single Claims Manager pursuant to Clause 61(3)(b) of the Regulations.
2. The Registrar forwarded two files being the original claim by Robert Maxwell Newton (**Newton**) and the State of New South Wales (**the State**) and a second file which comprised a claim by the State against Wallaby Grip Ltd (**WGL**) and Amaca Pty Ltd (**Amaca**). WGL cross claims against Klinger Ltd (**Klinger**).

The Original Proceedings

3. Mr Newton commenced proceedings in December 2007 against the State alleging that he had been exposed to asbestos dust and fibre during his employment at the State Dockyard in Newcastle between “December 1956 and the end of 1959”.
4. Mr Newton alleged that while employed at the Newcastle Dockyards as a labourer/ironworker he worked on the construction of the ships “Bass Trader” and “Princess of Tasmania”. He did not work directly with asbestos but worked in the vicinity of ladders. Large amounts of dust and fibre were inhaled by him. Mr Newton identified the material that the ladders worked with as follows:

Asbestos rope

Asbestos tape

Asbestos blanket materials

Asbestos packings

Asbestos gaskets

Asbestos klingerite sheets

Asbestos pre-moulded pipe sections

Asbestos in bagged form (blue and white asbestos)

5. There was some evidence that he may have used asbestos tape later in his career but the exposure was minimal and does not form part of the cross-claims.
6. Mr Newton developed mesothelioma and the original proceedings were settled on the basis that he be paid \$280,000 inclusive of costs.

The Current Proceedings

7. As noted above the State has filed a claim against Amaca and WGL. WGL has cross-claimed against Klinger seeking contribution or indemnity and damages.

Categorising the Parties

8. In its Revised Reply the State submits that it should be placed into Category 2 and that Amaca and WGL should be placed into Category 1 for the purposes of applying the Standard Presumptions set out in clause 5 of the Dist Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 Table 5(1) (**the Order**).
9. The State made no specific submissions as to why that categorisation should be preferred. It did not make reference to its role as Mr Newton's employer.
10. Each of the other parties submitted that the State should be a category 1 and category 2 defendant. I agree with those submissions. In my view the work at the Newcastle Dockyard involved the installation of asbestos products. Mr Newton gave evidence that the State was his employer and that for 3 years he was involved in the construction of ships that had as an integral part of their construction the installation of a large amount of asbestos lagging and manufactured products. Mr Newton gave evidence to the effect:

“As the construction of the ships progressed, all of the steam pipe work and the equipment in the engine rooms were required to be lagged; ladders would be working beside me and other workers applying various forms of asbestos insulation material to various areas of the ships under construction.”

11. For that reason I am satisfied that the State is an “installer” pursuant to Clause 5(2)(a) of the Order and so should be placed into category 1. I place the State into category 2 by reason of being Mr Newton’s employer.

12. I place each of the other parties into category 1 so the categorisation is as follows:

Category 1

Category 2

State of New South Wales

State of New South Wales

Amaca

WGL

Klinger

Variation of the Standard Presumptions

13. The next issue is whether the State’s apportionment under the Standard Presumptions in the Order should be varied. WGL submitted, and the other cross-defendants submitted in like terms, that actual knowledge of the dangers of asbestos should be attributed to the State with the consequence that its liability be increased by 20%.

14. In making that submission WGL referred me to the decision of another contributions assessor who was minded to increase the State’s liability by the full amount allowed under the Order. I am very reluctant to rely on determinations of other contributions assessors as a basis for varying the presumptions. The basis upon which a determination is made is heavily reliant on the facts of the case as well as the contributions assessor’s own review of the materials provided in the Statement of Particulars and Replies. None of the material considered by a contributions assessor is

- tested in cross-examination and so may not rise higher than assertion in the absence of further testing. I do not propose to vary the Standard Presumptions by reference to the other contributions assessor's findings.
15. As to whether the State had actual knowledge I am limited to considering the material provided in the Statement of Particulars and Replies. I am not satisfied on that material that I can find that the State had actual knowledge of the dangers of asbestos in the period in question.
16. WGL submitted that the State's contribution should be increased by 20% on the basis of the size and sophistication of its operation. In particular it pointed to the size of the workforce (1557 employees as at 30 June 1959), its turnover (£3,062,461) and profitability (£245,612).
17. In deciding whether to amend the Standard Presumptions I am conscious of the directive in Clause 5(5) of the Order that:
"However, a different percentage figure from the standard presumption within the variation band is not to be applied by the Contributions Assessor unless the Contributions Assessor is satisfied to vary the standard presumptions in the particular circumstances of the individual case".
18. There are circumstances here whereby I consider it is not appropriate to vary the standard presumptions. As the State falls into both category 1 and category 2 it is already incurring the liability of a party with actual knowledge of the dangers of asbestos and therefore incurring a greater liability because of that. It is unnecessary in the circumstances of this case to increase its liability in respect of Category 2 because of its size and sophistication or for failure to take steps to minimise the risk of harm.
19. Accordingly I do not propose to vary the Standard Presumptions.

Innocent Defendants

20. Both Amaca and Klinger submit that they are “innocent defendants” pursuant to clause 53 of the Regulations.
21. Amaca makes that submission on the basis that none of the products that it manufactured are identified by name in Mr Newton’s evidence. The references to asbestos products are generic in nature.
22. Klinger submits that it is an innocent defendant on the basis that:

“The cross-defendant did not manufacture or supply the products to which Mr Newton alleges he was exposed (or any products at all) during the period “between December 1956 and late 1959”.
23. Klinger attached to its Reply the sworn affidavits of Jon Lyons and Donald Munro which showed that Klinger was not incorporated as a company until 4 December 1958 as well as evidence that points to the fact that the Klinger factory was “officially opened” in Melville by Premier Brand on 2 December 1959. Mr Lyons states that his investigations have *“led me to believe that [Klinger’s] factory began operating some time after 25 November 1959”.*
24. Klinger submits that it is an innocent defendant because its manufacturing facility was not operational at the time Mr Newton alleges he was exposed to its products.
25. As I read clause 53 of the Regulations and clause 4(4) of the Orders I am not able to allocate no liability to a cross-defendant simply because it asserts that it is an innocent defendant. I am required to assume each

cross-defendant is liable “*unless the defendants agree that a particular defendant should not be liable*”: Clause 4(4). There is no such agreement here.

26. Clause 53 of the Regulations goes to the costs consequences of failing to agree that a party is an innocent defendant. But that is a matter to be dealt with by the Tribunal at a later date. Accordingly, I find that neither Amaca nor Klinger avoid a liability in respect of this Determination by reason of claiming to be an innocent defendant.

When Should Klinger’s Liability Commence

27. As can be seen from the discussion above Klinger puts that it could not be liable for Mr Newton’s injury because its best researches indicate that it did not commence manufacturing asbestos products until November 1959. In fact, it put its submission higher than that at point 3 in response to question 8.9 of its Reply:

“There exists no evidence whatsoever that any of the products described by the plaintiff during the period “between December 1956 and late 1959” were manufactured or supplied by the cross-defendant”.

There is some evidence. Mr Newton’s own recollection in his Statement of Particulars that his workplace exposure included exposure to “Asbestos gaskets” and “Asbestos Klingerite sheets”. That is, it was Mr Newton’s recollection that Klinger products were supplied for use (and used) during his employment at the Newcastle Dockyard. I think that evidence must be given some weight.

28. I accept that there is evidence from a current managing Director of Klinger and a person engaged as a consultant who was a former long time

employee, that manufacturing did not commence until late 1959 or perhaps early 1960. The difficulty with accepting that evidence is that it does not come from persons who were present when the factory in Perth was commissioned and actually commenced manufacturing. Doing the best they can each witness has formed a belief as to when manufacturing was likely to have commenced. I would have been more persuaded if the evidence came from persons who were present when manufacturing commenced.

29. I have considered the documentary evidence annexed to the Klinger Reply but none of it is determinative of the fact in issue. I balance against that Mr Newton's actual recollection that he was exposed to Klinger products. That is substantial evidence as it comes from a person who was present at the Newcastle Dockyard when the exposure was said to occur.

30. WGL submits in its Amended Reply that the parties should apply a time on risk approach to exposure and that Klinger should be on risk for the whole of 1959 (but not 1957 or 1958). I cannot say with certainty when Klinger started manufacturing and supplying its product. On its evidence neither can Klinger. Doing the best I can I assume that Mr Newton's exposure to Klinger product commenced on 1 July 1959 and continued for 6 months to the end of 1959.

31. Klinger's final submission was to the effect that if I was satisfied that its products were supplied to the Newcastle Dockyard then their products were not causative of his mesothelioma. I am not satisfied on the evidence of tests conducted in recent years that those tests can be equated to Mr Newton's exposure in the workplace.

32. The factual matters that are relevant to my apportionment determination (see clause 3 of the Standard Presumptions) include:

- a. Mr Newton suffered mesothelioma. Mesothelioma is an in divisible disease;
- b. He was exposed to asbestos between December 1956 and the end of 1959;
- c. Mr Newton states that he was exposed to white and blue asbestos in the workplace;
- d. The lag time between his exposure and diagnosis is consistent with the latency period of mesothelioma; and
- e. No effective steps were taken to advise Mr Newton of the dangers of exposure to asbestos or to protect him against exposure.

The Apportionment

33. All exposure occurred in period A (pre 1 January 1961). The first differential period where Klinger was not involved is for the period December 1956 to June 1959 – 31 months. The second period where Klinger is also on risk is 6 months.

The First Period (split 75:25 as between Category 1 and Category 2 defendants)

Party	Category	Calculation	Total
The State	1	$75/3 \times 31/37$	20.95
The State	2	$25\% \times 31/37$	20.95
WGL	1	$75/3 \times 31/37$	20.95
Amaca	1	$75/3 \times 31/37$	20.95
			83.8%

The Second Period

Party	Category	Calculation	Total
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The State	1	18.75% x 6/37	3.04
The State	2	25% x 6/37	4.05
WGL	1	18.75% x 6/37	3.04
Klinger	1	18.75% x 6/37	3.04
Amaca	1	18.75% x 6/37	3.04
			16.2%

Accordingly the following apportionments apply (allowing for rounding):

The State 49%
WGL 24%
Amaca 24%
Klinger 3%

I have been asked to appoint a Single Claims Manager. I select the State of New South Wales.

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David Jay

Contributions Assessor

6 July 2009