

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

DDT No. 38 / 2010

BETWEEN: **WILLIAM STEPHENS**
Plaintiff

AND: **SELTSAM PTY LIMITED**
First Defendant

AND: **AMACA PTY LIMITED**
Second Defendant

AND: **J.E. FAHEY INVESTMENTS PTY LIMITED**
Third Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me, pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* ("the Regulations") for a determination of apportionment as between the Defendants.
2. So far as is relevant, Regulation 49 of the Regulations requires me to determine the contribution of each Defendant and to make such determination
 - (i) On the assumption that each of the Defendants is liable,
 - (ii) Solely on the basis of the Plaintiff's Statement of Particulars and the Defendants' Replies, and
 - (iii) On the basis of the Standard Presumptions as to apportionment, as determined by the Minister for the purposes of the Regulation.

3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as “the Standard Presumptions Order”) provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.
4. In the present matter, William Stephens issued a Statement of Claim on 22 February 2010 in which he alleged that:
 - (i) Between 28 February 1955 and 5 August 1971 he was employed by Overall’s Hardware Pty Ltd as a general shop assistant and yardman and that during his employment he manually unloaded and reloaded asbestos fibro sheeting onto trucks in enclosed areas, cut fibro sheets with fibro cutters and generally handled asbestos-containing products as sold by Overall’s Hardware Pty Ltd.
 - (ii) In the course of his employment, the Plaintiff was exposed to and inhaled asbestos dust and fibre. Seltsam Pty Ltd (hereinafter referred to as “Seltsam”) and Amaca Pty Ltd (hereinafter referred to as “Amaca”) manufactured and supplied the asbestos materials to Overall’s Hardware Pty Ltd.
 - (iii) From 1972 to 18 October 1986 the Plaintiff was employed by J.E. Fahey Investments Pty Ltd (hereinafter referred to as “Fahey”) as a sales assistant and in the course of his employment he manually unloaded and reloaded asbestos fibro sheeting onto trucks in enclosed areas, cut fibro sheets with fibro cutters and generally handled asbestos-containing products which were manufactured and supplied by Seltsam and Amaca.
 - (iv) On 12 October 1974 a fire occurred at the Fahey premises and the Plaintiff was involved in cleaning up the areas, which included shovelling burnt materials containing asbestos in bins. A substantial amount of dust and fibre was released into the air at this time.
5. On 25 March 2010 the Plaintiff filed an Amended Statement of Claim. The Amended Statement of Claim altered the allegation in relation to the period of employment with Overall’s between 28 February 1955 and 7 August 1971 by deleting a reference to Amaca being a manufacturer and supplier in that period, but otherwise continued the same allegations as previously made.
6. The exposure that occurred between 1972 and 18 October 1986 fell into period B of the Standard Presumptions Order for the period between 1972 and 31 December 1978, during

which time, a Category 1 Defendant was liable for 65% and a Category 2 Defendant 35% of the liabilities [subject to variation]. After 1 January 1979 until 18 October 1986 the exposure fell within period C and in that period a Category 1 Defendant was presumed to be 60% responsible and a Category 2 Defendant 40% responsible.

7. The Plaintiff is alleged to be suffering from *inter alia*, a mesothelioma, which of course is an indivisible condition.
8. On 20 March 2010 the Plaintiff filed and served a Statement of Particulars which relevantly alleged:
 - (i) Between 28 February 1955 and 5 August 1971 Overall's Hardware Pty Ltd employed the Plaintiff.
 - (ii) Between 1972 and 18 October 1986 Glen's Hardware Pty Ltd employed the Plaintiff.
 - (iii) In 1987 the Plaintiff built a garage with products from Glen's Hardware. Presumably, this is an allegation of asbestos being used, but I note that this is not alleged in the Statement of Claim.
 - (iv) While working at Overall's Hardware Pty Ltd, the Plaintiff regularly handled and sold asbestos products to the public, cut asbestos sheets with cutters and handsaws, loaded and unloaded trucks with asbestos products, cut asbestos tape and rope with scissors, cut asbestos sheets indoors in a big building with a roller door, and that:
 - (a) The Plaintiff's exposure occurred in premises at Rocky Point Road, Ramsgate.
 - (b) The exposure was daily and the level or intensity of exposure was described as being medium to high
 - (c) Approximately 50% of his overall exposure came from this period of employment.
 - (d) The Plaintiff alleges that he was exposed to asbestos fibre, asbestos sheets, asbestos rope, asbestos tape, plumbing supplies and pipe supplies, all of which were supplied by Wunderlich. The Plaintiff estimates that 90% of the products were asbestos cement sheeting and 10% were asbestos tape and rope.
 - (e) Included in the material provided by the Plaintiff is a statement by Geoffrey Neil Overall, which relates to the Plaintiff's exposure while employed with

Overall's Hardware Pty Ltd and essentially supports the Plaintiff's allegations.

- (v) While employed by Glen's Hardware Pty Ltd (now known as J.E. Fahey Investments Pty Ltd) the Plaintiff described his exposure to asbestos as being a work assistant and that he regularly handled and sold asbestos products to the public, cut asbestos sheets with cutters and handsaws, loaded and unloaded trucks with asbestos products, cut asbestos tape and rope with scissors and cut asbestos sheets indoors in a big building with a roller door and that -
- (a) All work was performed indoors insofar as the tape and rope was concerned
 - (b) While cutting of the sheets was cut under a roofed area with a back wall and gates.
 - (c) The Plaintiff also identifies the event of 12 October 1974 while working for Fahey.
 - (d) The Plaintiff describes his exposure as being daily and the level of intensity of exposure was high, particularly during the fire cleanup.
 - (e) The Plaintiff estimates that 50% of his exposure occurred during the period of employment with Fahey.
 - (f) The Plaintiff identifies being exposed to corrugated asbestos sheets either super six and standard, flat asbestos sheets known as Hardiflex, fully compressed asbestos sheets, decorated sheets such as Tilux, Hardigrain and Colourboard, planks and moulded panels such as Hardiplain, Weatherboard, Log Cabin, asbestos rope, asbestos tape, roofing accessories, Durabestos mouldings, Durabestos sheets, Durabestos roof sheets.
 - (g) The Plaintiff identifies the manufacturer and/or supplier of the asbestos products as Wunderlich and Hardies.
 - (h) The Plaintiff estimates that 90% of his exposure occurred to sheeting and 10% to tape and rope.
 - (i) Included in the material provided by the Plaintiff is a statement by Ronald Charles Green which essentially supports the Plaintiff's allegation and

9. On 4 May 2010 Seltsam filed a Reply which relevantly alleges:
- (i) Seltsam ceased manufacturing asbestos-containing products in July 1977 and that any reference to the use of new asbestos-containing products after July 1977 is not a reference to any product manufactured by Seltsam.
 - (ii) Seltsam admits that it manufactured and supplied Log Cabin from 1961 to July 1977.
 - (iii) Seltsam admits that it manufactured and supplied Durabestos asbestos cement products during the period 1955-1977.
 - (iv) The remaining asbestos-containing products identified by the Plaintiff were manufactured and/or supplied by Amaca and/or other manufacturers.
 - (v) Seltsam and Amaca should be classified as Category 1 Defendants while Fahey should be classified as a Category 2 Defendant.
 - (vi) In the period 28 February 1955 to 5 August 1971 Seltsam should be found to be 50% responsible.
 - (vii) For the period 1972-1986 Seltsam should be 3.8% responsible, Fahey should be 21.93% responsible and Amaca should be 24.27% responsible.
10. On 6 May 2010 Amaca filed a Reply which relevantly alleges that:
- (i) The reference by the Plaintiff to fibro sheeting, asbestos cement sheeting and roofing accessories are generic product descriptions and may have been manufactured and/or supplied by several manufacturers.
 - (ii) Amaca admits that it manufactured fibrolite flat sheets between 1955 and 1965.
 - (iii) Amaca admits that between 1966 and 1982 it manufactured asbestos-containing building products known as Hardiflex.
 - (iv) Between 1962 and 1983 it manufactured asbestos-containing building products known as pressed sheets.
 - (v) Amaca admits that between 1952 and 1982 it manufactured asbestos-containing building products known as super six.
 - (vi) Between 1937 and 1980 it manufactured products known as Tilux.
 - (vii) Between 1969 and 1982 it manufactured Hardiplank.
 - (viii) Between 1962 and 1982 it manufactured Log Cabin.
 - (ix) Between 1960 and 1982 it manufactured Colourboard.
 - (x) Between 1937 and 1983 it manufactured asbestos-containing building products known as roofing accessories.
 - (xi) Between 1961 and 1982 it manufactured weatherboard.

- (xii) Amaca did not manufacture asbestos tape and asbestos rope, Durabestos mouldings, Durabestos sheets, Durabestos roofing and such products were manufactured by Wunderlich.
- (xiii) Amaca does not know and cannot admit to manufacturing the product known as Hardigrain.
- (xiv) Wunderlich manufactured asbestos cement flat sheets known as Wunderflex.
- (xv) Durabestos accessories were manufactured and/or supplied by Wunderlich.
- (xvi) Wunderlich manufactured corrugated sheet known as Durabestos standard corrugate and/or Deep 6.
- (xvii) Wunderlich manufactured and/or sold cement asbestos sheets and a product known as Durabestos Log Cabin and Durabestos Weatherboard.
- (xviii) 10% of the Plaintiff's overall exposure came from asbestos tape and asbestos rope, which was not manufactured by Amaca.
- (xix) Amaca sets out in detail the alleged composition of asbestos in its product.
- (xx) Amaca and Seltsam should be placed in Category 1 and Fahey should be placed in Category 2.
- (xxi) The Standard Presumptions should not be varied, but the overall apportionment should be calculated that Amaca is 15.25%, Seltsam 65.52% and Fahey 18.95%.

11. Fahey provided a Reply which relevantly alleges:

- (i) Amaca and Seltsam should be placed in Category 1 and Fahey should be placed in Category 2.
- (ii) Fahey employed the Plaintiff as a sales assistant in a small family hardware store.
- (iii) The Plaintiff was employed in the paint section and it was extremely rare for him to load or unload asbestos cement products.
- (iv) Employees of Fahey rarely cut any asbestos sheets for clients.
- (v) The fire did not affect the asbestos products stored at the rear of the premises.
- (vi) Asbestos products accounted for only 10% of total stock carried.
- (vii) The bulk of the stock sold was asbestos cement flat sheets.
- (viii) Fahey sold no asbestos rope or tape.
- (ix) The standard presumptions should be varied

12. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) and make a determination of what proportion of the whole

each separate period bears having regard to the number of such periods, the length of each period, the duration of and intensity of exposure to asbestos present in each such period.

13. Based on the material before me, I determine the contribution between the two relevant periods to be 75% for the first period and 25% for the second period. I do so on the basis of the material asserted by Fahey as to the level, intensity and frequency of the Plaintiff's exposure. I particularly have had regard to the assertions made by Fahey that they did not stock asbestos rope or tape.
14. Obviously in the first period there is only one Category 1 Defendant, namely Seltsam.
15. In the second period where Fahey was the employer, there of course must be an apportionment between the Category 1 Defendants and the Category 2 Defendant. This period must be broken into 3 periods, namely 1972 until July 1977 [when Seltsam ceased manufacture], which period represents approximately 35% of the total period, August 1977 until 31.12.1978, when the Standard Presumptions varied, which period represents approximately 10% of the total period, and from 1.1.79 until 18.10.86, which period represents approximately 55% of the total period.
16. I determine that Amaca and Seltsam fall into Category 1 and Fahey falls into Category 2.
17. In the present case, the Standard Presumptions do not take into account the various aspects of the liability of Category 1 Defendants and Category 2 Defendants, for the reasons as outlined by Fahey, with which I agree and adopt in the present circumstances, and accordingly there should be a 20% variation in the Standard Presumptions in favour of Fahey.
18. Having regard to the above, the following calculation could be made:

$$\begin{aligned} & \text{Fahey - Period 2 only - } 35\% \times 85\% \div 2 = 5.25 \text{ [1972/7.1977]} & 8.875\% \\ & \quad + 10\% \times 85\% \div 2 = 1.5 \text{ [8.1977 - 31.12.78]} + 55\% \times \\ & \quad 20\% \div 2 = 11 \text{ [1.1.79 - 18.10.86]} \\ & \text{Amaca - Period 2 only - } 35\% \times 85\% \div 2 \div 2 = 7.4375 + 10\% & 33.6875\% \\ & \quad \times 85\% \div 2 \div 2 = 4.25 \text{ [8.77 - 31.12.78]} + 55\% \times 80\% \end{aligned}$$

$$\div 2 = 22\%$$

$$\text{Seltsam} - \text{Period 1} - 50\% + \text{Period 2} - 35\% \times 85\% \div 2 \div 2 = 57.435\%$$

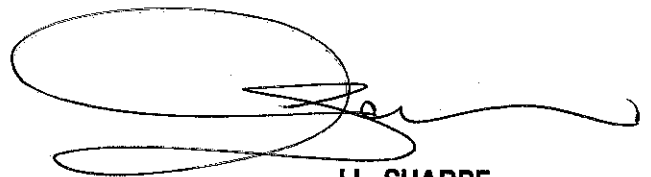
7.4375

Total 100%

19. Allowing for possible overlapping of the calculations, I determine that the relevant contributions (rounding such apportionments to whole numbers) are as follows:

| | |
|---------|------|
| Fahey | 9% |
| Amaca | 34% |
| Seltsam | 57% |
| Total | 100% |

20. Pursuant to clause 61 of the Regulations, I appoint Seltsam as the Single Claims Manager as it is the primary Defendant defined under clause 61(9).



J.L. SHARPE

Contributions Assessor

7th June 2010