

# SUPREME COURT OF QUEENSLAND

CITATION: *WorkCover Queensland v Amaca Pty Limited and Anor*  
[2011] QSC 282

PARTIES: **WORKCOVER QUEENSLAND**  
(Plaintiff)

v

**AMACA PTY LIMITED (ACN 000 035 512)**  
(First Defendant)

and

**SELTSAM PTY LTD (ACN 000 003 734)**  
(Second Defendant)

FILE NO/S: BS 5399 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 5 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 2 September 2011

JUDGE: Boddice J

ORDER: **The parties are to prepare minutes of orders in accordance with these reasons.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – PARTICULARS – where the second defendant seeks further and better particulars to ascertain details of any positive case asserted by the plaintiff – where that application is opposed by the plaintiff on the basis it has sufficiently particularised its case – whether the particulars sought are in the nature of interrogatories – whether the present pleading sufficiently identifies the case the second defendant is to meet

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where the plaintiff seeks further and better disclosure from the second defendant pursuant to either rr 211 and 223(1) and (4) of the UCPR or alternatively r 367

of the UCPR – where the plaintiff submits the documents sought tend to prove or disprove an allegation in contention in the pleadings – where the plaintiff submits the documents sought will be in the possession or control of the respondent – where the second defendant submits the application amounts to a fishing expedition – whether the making of an order for further and better disclosure would be oppressive in all of the circumstances

*Uniform Civil Procedure Rules 1999 (Qld)*

*Amaca Pty Ltd v Hannell* [2007] WASCA 158

*Company Solutions (Aust) Pty Ltd v Keppell Cairncross Shipyard Ltd* [2004] QSC 379

*GW Young and Co Ltd v Scottish Union and National Insurance Company* (1907) 24 TLR 73

*Julia Farr Services Inc v Hayes* [2003] NSWCA 37

*Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276

*Seltsam Pty Ltd v McNeill* [2006] NSW CA 158

*Visionmax Pty Ltd v Budget Specks (Franchising) Pty Ltd* [2006] FCA 222

COUNSEL: K Holyoak for the plaintiff  
TGR Parker, SC for the defendants

SOLICITORS: Bruce Thomas Lawyers for the plaintiff  
CLS Lawyers for the defendants

- [1] WorkCover Queensland (“WorkCover”) claims recovery, by way of statutory indemnity, of workers compensation benefits paid to Rex Noel Thomson. By application filed 30 August 2011, the second defendant, Seltsam Pty Ltd (“Seltsam”) sought further and better particulars of WorkCover’s claim. By application filed 31 August 2011 WorkCover seeks further and better disclosure from Seltsam. Each application is opposed.

**The claim**

- [2] WorkCover alleges that between 1947 and 1983 Thomson inhaled asbestos in the course of building work, from using products made by James Hardie and Wunderlich. Amaca Pty Limited (“Amaca”) is the former manufacturer of James Hardie building products, some of which contained asbestos. Seltsam formerly manufactured Wunderlich building products, some of which contained asbestos.
- [3] WorkCover claims Seltsam breached its duty of care to Thomson in that it knew or ought to have known at the time of each alleged exposure to dust from its products, that builders using those products were at risk of contracting disease. It is alleged that Seltsam should have warned Thomson or his employer of those risks, or ceased to use asbestos in its products, and that its failure to do so caused Thomson’s disease. Seltsam puts in issue whether Thomson had any exposure to asbestos from

its products, and to the extent that any such exposure is established, that it owed a duty of care, breached that duty of care, and that Thomson's disease was caused by such breach.

### **Particulars**

- [4] The request for particulars concerned WorkCover's allegations in relation to Thomson's employment, Thomson's exposure to asbestos from Seltsam's products, Seltsam's knowledge, what Seltsam ought to have done to avoid the risk, and causation. It was apparent, during argument, that Seltsam's request is directed toward ascertaining details of any positive case asserted by WorkCover.
- [5] Seltsam submits it is necessary for it to be apprised of any such positive case having regard to the nature of the disease, and the existence of another defendant manufacturing differing products containing asbestos. It points to various factors identified by an occupational hygienist, Alan Rogers, as being critical to any assessment of risk from exposure to asbestos, and the effectiveness of any warnings or alternate methods.
- [6] WorkCover opposes providing further particulars on the basis that it has sufficiently particularised its case so as to apprise Seltsam of the case it has to meet. It points to the distinction between particulars and interrogatories.<sup>1</sup> It submits that that distinction is important, having regard to the need for leave of the court to deliver interrogatories, and that the further particulars sought are in the nature of interrogatories.

### *Paragraph 1*

- [7] Seltsam seeks particulars of Thomson's employment in each period during which it is alleged he inhaled asbestos fibres from products manufactured or supplied by Seltsam. WorkCover submits no further particulars are required as it has confirmed, in its answers to the request for particulars, that it relies upon the allegations in paragraph 2 of the statement of claim.
- [8] Paragraph 2 of the statement of claim is in the following terms:

“2. Between 1947 and 1983 Rex Noel Thomson, a male person born on or about 30 June 1931 ('Thomson'), was employed as a carpenter and/or builder by various employers within the State of Queensland including:

- (a) J C McLucas between 1947 and 1959;
- (b) Crisp Buslines in or about 1959;
- (c) Hartwell and Street between 1961 and 1963;
- (d) Merv Elmy between 1963 and 1965;
- (e) By Rohrig and Burns between 1963 and 1965;
- (f) By K W & D O Burns Pty Ltd between 1965 and 1994.”

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<sup>1</sup> See *GW Young and Co Ltd v Scottish Union and National Insurance Company* (1907) 24 TLR 73 at 74; adopted in *Visionmax Pty Ltd v Budget Specs (Franchising) Pty Ltd* [2006] FCA 222.

- [9] Seltsam submits it is entitled to further and better particulars by reason of the word “including” in paragraph 2. It submits such a word is “non-exhaustive”. There is substance in Seltsam’s submission. It is entitled to have confirmation that no other employer is relied upon, other than those specified in paragraph 2. Further, it is entitled to particulars of the period of Thomson’s employment with that employer, and the trade practised by him. WorkCover should provide further and better particulars in response to paragraphs 1(a), 1(b), 1(c) and 1(d) of the request.
- [10] Paragraph 1(e) of the request is in a different category. It seeks particulars of the period of time over which it is alleged Thomson inhaled asbestos fibres from products manufactured or supplied by Seltsam. Having regard to paragraph 2 of the statement of claim, such particulars are unnecessary, unless WorkCover contends that particular periods of employment, with particular employers, only involved the use of asbestos products manufactured or supplied by Seltsam. If that be the case, WorkCover ought to provide further particulars. If not, WorkCover should confirm that position. To that extent, WorkCover should provide a response to the request in paragraph 1(e).

*Paragraph 2*

- [11] The particulars sought in paragraph 2 specifically relate to “each overall exposure period specified” in response to paragraph 1(e) of the request. Having considered the pleadings and the further and better particulars provided in response, I am satisfied WorkCover has sufficiently particularised its case. I decline to order a further response to paragraph 2 of the request.

*Paragraph 3*

- [12] Paragraph 3 of the request relates to particulars of the Seltsam building products alleged to have been used by Thomson. It seeks particulars of proportions of each product which allegedly contained asbestos, crocidolite or amosite.
- [13] The purpose of particulars is to apprise a party of the case it has to meet. They are to be contrasted with interrogatories.<sup>2</sup> Whilst it is necessary, in order for Seltsam to understand the case it has to meet, for WorkCover to particularise any particular products positively relied upon as part of its case against Seltsam, there is no requirement for WorkCover to particularise the proportion of the product which allegedly contained asbestos. The proportion of the product is a matter peculiarly within the knowledge of Seltsam. I decline to order a further response to paragraph 3 of the request.

*Paragraph 4*

- [14] Paragraph 4 of the request seeks particulars of the injuries it is alleged Seltsam knew a person exposed to dust was at risk of developing and, for each injury, the identity of the individual with such knowledge and particulars of when and how that individual acquired the knowledge, and the facts and circumstances relied upon to support the contention that that knowledge was the knowledge of Seltsam.
- [15] If WorkCover is advancing, as a positive case, an allegation that a particular individual on behalf of Seltsam had the requisite knowledge, Seltsam is entitled to know the identity of that individual. If WorkCover does not contend that any specified individual had the requisite knowledge, Seltsam is entitled to be informed

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<sup>2</sup> See, generally, *Visionmax Pty Ltd v Budget Specs (Franchising) Pty Ltd* [2006] FCA 222.

of that position. To the extent that WorkCover seeks to make a positive case that a specified individual had the requisite knowledge, the particulars sought in paragraph 4 of the request are appropriate particulars, but not otherwise. To that extent, WorkCover should provide a response to paragraph 4 of the request.

*Paragraph 5*

- [16] Paragraph 5 seeks particulars of the injuries Seltsam ought to have known that persons exposed to dust emanating from each specified product were at risk of developing, including particulars of when and how Seltsam ought to have acquired such knowledge.
- [17] The statement of claim alleges, in paragraph 8(d), that Seltsam knew or ought to have known that persons exposed to the dust emanating from “such products” were at risk of developing injury, including mesothelioma. It cannot reasonably be asserted that Seltsam is not properly apprised of the case it has to meet. The further particulars sought are in the nature of interrogatories. I decline to order the provision of further particulars in response to paragraph 5 of the request.

*Paragraph 6*

- [18] Paragraph 6 of the request seeks particulars, for each of the products previously identified, of the warnings, precautions, enquiries or substitute products it is alleged should have been provided by Seltsam.
- [19] A relevant issue in any determination of this proceeding will be the terms of the warning and/or precautions it is alleged Seltsam ought to have given or taken, together with whether such warning or precautions would have made a difference in the circumstances.<sup>3</sup> As such, it is relevant for Seltsam to be informed of the terms of the warnings and/or precautions relied upon by WorkCover. The particulars sought in paragraphs 6(a) and (b) of the request are appropriate. WorkCover ought to provide further particulars in response thereto.
- [20] Paragraph 6(c) of the request seeks identification of the “available published study data and information” relied upon by WorkCover. This request is in response to paragraph 10(i) of the statement of claim which pleads:-

“Failing to adequately research or investigate available published, studies, data and information identifying the risks to health posed by inhalation of asbestos dust and fibre.”

That pleading sufficiently identifies the case Seltsam has to meet. The further particulars sought are not necessary to apprise Seltsam of the case it has to meet. I decline to order the particulars sought in paragraph 6(c) of the request.

- [21] Paragraph 6(d) (incorrectly numbered as a second (c)) seeks particulars of the non-asbestos substitute products it is alleged Seltsam ought to have used. This request is in response to the following plea at paragraph 10(j) of the statement of claim:-

“Failing to replace the use of asbestos in the second defendant’s products, as it later did, with alternative materials that did not pose an equivalent risk to the health of persons inhaling dust emanating from such products.”

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<sup>3</sup> *Seltsam Pty Ltd v McNeill* [2006] NSW CA 158 at [106]

That pleading identifies that WorkCover's case is that Seltsam ought to have replaced asbestos with alternative materials "as it later did". Such a plea identifies the case Seltsam has to meet. There is no need for any further particularisation. I decline to order the particulars sought in paragraph 6(d) of the request.

*Paragraph 7*

- [22] Paragraph 7 of the request seeks particulars of whether it is alleged that the steps previously identified would have eliminated all of the alleged inhalation of asbestos, and to the extent that it is not so alleged, the degree to which it is alleged each step would have reduced the inhalation of asbestos.
- [23] The present pleading sufficiently identifies the case Seltsam has to meet. There is no need for further and better particularisation. I decline to order the particulars sought in paragraph 7 of the request.

*Paragraph 8*

- [24] Paragraph 8 of the request seeks particulars as to whether it is alleged that Thomson's inhalation of asbestos emanating from Seltsam's products amounted to more than 50 per cent of Thomson's total risk of contracting mesothelioma. If so, particulars are sought of all other asbestos exposures.
- [25] Seltsam is entitled to be informed whether it is WorkCover's case that the risk attributable to Thomson's inhalation of asbestos from its products amounted to more than 50 per cent of Thomson's total risk of contracting mesothelioma. This is particularly so having regard to the factors relevant to an assessment of the impact of exposure over a period of time. To that extent, the particulars sought are an appropriate request for particulars. However the matters sought by way of further particularisation in that event are not necessary in order to inform Seltsam of the case it has to meet. They are in the nature of interrogatories. I decline to order that WorkCover provide particulars other than in respect of the first sentence of paragraph 8 of the request.

*Paragraph 9*

- [26] Paragraph 9 of the request seeks particulars of whether WorkCover relies on any basis other than as set out in paragraph 8 for an assertion that Thomson's inhalation of asbestos emanating from Seltsam's products caused him mesothelioma. If it is alleged that inhalation of asbestos from Seltsam's products exceeded some particular threshold sufficient to be causative, details of that threshold and how it is alleged it was met are sought by Seltsam.
- [27] Seltsam is entitled to know whether WorkCover is positively asserting that the inhalation of asbestos emanating from Seltsam's products exceeded a particular threshold and, if so, the basis for that assertion. WorkCover should provide further particulars in respect to paragraph 9 of the request.

**Further and better disclosure**

- [28] The application for further and better disclosure is made pursuant to either UCPR 211 and 223(1) and (4) or, alternatively UCPR 367. WorkCover submits that the authorities on asbestos related disease claims distinguish between occupational cases, where asbestos dust and fibres is encountered regularly by handling asbestos

cement sheeting in work place situations, from the occasional casual users.<sup>4</sup> The factual question in relation to duty in occupational cases has, WorkCover submits, been repeatedly considered by reference to a large body of evidence that the risk of injury from exposure to asbestos dust and fibre was reasonably foreseeable on the basis that there was “no known safe dose of asbestos”.<sup>5</sup> WorkCover submits that as a consequence of these various cases, there is an array of evidence which Seltsam can be demonstrated to have been concerned with such that it is best placed to provide material relevant to foreseeability of risk.

- [29] The application for further and better disclosure is made on the basis that the categories of documents sought are documents which tend to prove or disprove an allegation in contention in the pleadings, and are documents which will be in the possession or control of the respondent. WorkCover submits there is an “objective likelihood” that Seltsam has not complied with its duty of disclosure having regard to the evidence that documents in each of the categories sought are in the possession or power of Seltsam and have not been disclosed by it. Alternatively, WorkCover submits that UCPR 223(4)(a) provides an independent power for the disclosure of these documents, particularly having regard to the importance of UCPR 5 to modern litigation.<sup>6</sup> Finally, WorkCover submits that this documentation is relevant and an order requiring Seltsam to provide it would be “in the interests of justice”.<sup>7</sup>
- [30] Seltsam objects to any order being made in respect of further and better disclosure. It submits the application amounts to no more than a fishing expedition in circumstances where WorkCover has determined to plead a particular case which it has to prove at trial. Insofar as UCPR 223(4)(a) is relied upon, Seltsam submits the making of an order for further and better disclosure would be oppressive in all of the circumstances. It also would not be in the interests of justice.
- [31] The categories of documents the subject of the request for further and better disclosure are set out in the application:
- “(a) Copies of all proceedings commenced in Australia against the Second Defendant claiming damages for personal injuries caused by inhaling asbestos.
  - (b) Copies of defences or other pleadings filed or served by the Second Defendant in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos in proceedings in which the Second Defendant disputed the foreseeability of personal injury caused by exposure to asbestos.
  - (c) Copies of all particulars served by Plaintiffs in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos in proceedings in which the Second Defendant disputed the foreseeability of personal injury caused by exposure to asbestos.

<sup>4</sup> See, for example, *Seltsam Pty Ltd v McNeill* [2006] NSWCA 158 at [28] – [29]; *Amaca Pty Ltd v Hannell* [2007] WASCA 158.

<sup>5</sup> *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 at [2].

<sup>6</sup> See, generally, *Company Solutions (Aust) Pty Ltd v Keppell Cairncross Shipyard Ltd* [2004] QSC 379.

<sup>7</sup> UCPR, r 367

- (d) Copies of all Affidavits and other proofs of evidence, relating to the issue of the foreseeability of injury resulting from exposure to asbestos, from witnesses served on the Second Defendant in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos.
- (e) Proofs of evidence, Affidavits or other documents setting out the evidence of witnesses obtained by or served by the Second Defendant, relating to the issue of foreseeability of personal injury resulting from exposure to asbestos, in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos.
- (f) Any judgments and orders entered against the Second Defendant in Australia in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos.
- (h) Any expert reports addressing the issue of the foreseeability of risk of injury from inhaling asbestos served by or otherwise relied upon by the Second Defendant in any proceedings commenced in Australia for damages for personal injuries caused by exposure to asbestos.
- (i) Any research materials or publications relating to the issue of foreseeability of injury resulting from exposure to asbestos served upon the Second Defendant, or served by the Second Defendant, in any actions commenced in Australia against the Second Defendant for damages for personal injuries caused by exposure to asbestos.”

[32] It is apparent from a perusal of those categories that the disclosure sought by WorkCover would be extensive and time consuming, requiring Seltsam to search its records to firstly ascertain the proceedings commenced in Australia against it claiming damages for personal injuries caused by inhaling asbestos, and then to identify multiple documents in relation thereto.

[33] Having considered the authorities, I am satisfied the documents sought are not, based on the current pleadings, directly relevant to an allegation in issue in the pleadings. To order disclosure would amount to fishing. WorkCover has not established that Seltsam has in its possession documents directly relevant to an allegation in issue which have not been disclosed to date. The application for further and better disclosure, based on s 223(4)(b), is refused.

[34] WorkCover also makes application for further and better disclosure pursuant to s 223(4)(a) UCPR. That power, it is submitted, is an independent power that operates even where the duty of disclosure has not been breached by WorkCover, provided there are special circumstances and the interests of justice require it.

[35] Subject to one aspect, I am not satisfied there are special circumstances, in the interests of justice, warranting an order for disclosure in the terms sought by WorkCover. The documents sought will not materially advance resolution of the

issues in this case. That another proceeding may have had pleadings, or reports, or statements, does not determine any issue in dispute in these proceedings.

- [36] The one aspect of the application for further and better disclosure that is properly to be the subject of an order under UCPR 223(4)(a) relates to “proceedings commenced in Australia against the second defendant claiming damages for personal injuries caused by inhaling asbestos”. The identification of such proceedings will aid in limiting lines of enquiry. This is likely to ultimately facilitate the just and expeditious resolution of these proceedings.<sup>8</sup> This is information peculiarly within the knowledge or control of Seltsam.
- [37] I am satisfied there are special circumstances. I am also satisfied it is in the interest of justice to order disclosure of such proceedings.
- [38] Disclosure may properly be made by providing a list of the names of the parties to the proceeding, the Court in which the proceeding was commenced, and the Court file number. That list will apprise WorkCover of any relevant proceedings commenced against Seltsam. It is not necessary, or appropriate, for Seltsam to have to provide copies of those proceedings.

### **Order**

- [39] The parties are to prepare minutes of orders in accordance with these reasons.
- I shall hear the parties as to costs.

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<sup>8</sup> *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 283 [10]