

Strings attached to Hardie's \$31m bouncing cheque

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DISAGREEMENT is infectious. As the talks between James Hardie's chief financial officer Russell Chenu and ACTU Secretary Greg Combet reach the storming out in a huff stage, a side-stoush has erupted between the Medical Research and Compensation Foundation's directors, led by Sir Llew Edwards and Dennis Cooper, and a small, intrepid band of men sailing in a dinghy named ABN 60 Pty Ltd. Or perhaps more accurately, between their lawyers.

The three men are John Macphillamy, the CFO of investment bank Grant Samuel; David Trebeck, one of the directors of consultants ACIL Tasman; and a retired James Hardie executive named Don Cameron. They are, as I write, bobbing about in a stormy, shark-infested fiduciary sea, wondering how on earth this happened to them.

Their lawyer is Wendy Jacobs, of Dibbs Barker Gosling; Edwards's and Cooper's lawyer is Nancy Milne, of Clayton Utz.

ABN 60 is the new name of James Hardie Industries Ltd, whose businesses were all transferred into a separate Dutch company with the same name in 2001. When the foundation was set up in order to short-change asbestos victims, only part of the inadequate \$293 million was actually put into it.

For reasons best known to the scheme's architect, Peter Cameron, then of Allens and now a James Hardie director, \$100 million of it was put into ABN 60, nee James Hardie, to be doled out to the foundation at \$5.5 million a year for 42 years. Macphillamy, Trebeck and Don Cameron were invited to be the stewards of this money - to make sure it wasn't lost and to write a cheque each February.

So far, so good. Then this year the three men watched with mounting concern as the whole scheme went pear-shaped. The foundation, it turns out, is woefully short of money, and so, by extension, is ABN 60. In August, Milne, on behalf of the foundation, wrote to ABN 60 asking for all of its money, signalling that this should be accompanied by tearing up the original 2001 Deed of Commitment between the two entities, which would then allow ABN 60 and its directors to be sued for more.

At this point, concern turned into alarm. Macphillamy, Trebeck and Don Cameron scuttled to Wendy Jacobs for advice. To cut a long story short, James Hardie agreed to give those three indemnity. On Wednesday, with a sigh of relief, Don Cameron transferred \$31.5 million to the foundation's bank account and wrote to promise the rest of the ABN 60's cache (\$56 million) as soon as some securities were sold.

But what's this? The cheque bounced! (But not in the usual way). The foundation has given the money back! And what's more an application has been made to the court for provisional liquidation because it has \$40 million in cash and \$80 million in claims outstanding.

At ABN 60, relief has given way to despair. Our intrepid trio now say they are quite bewildered that the foundation won't take their money and is instead applying for an unnecessary liquidation.

Well, I can advise them. The foundation has legal advice that the cancellation in 2001 of \$1.9 billion in uncalled partly paid shares that had been an asset of JHIL (now ABN 60) may be unwound because it was in breach of the directors' duties. Milne and the foundation directors believe that accepting ABN 60's cash now will remove their opportunity to pursue the \$1.9 billion.

James Hardie has its own legal advice from Allens and Atanaskovic Hartnell that the \$1.9 billion can never be clawed back. And Jacobs has advised ABN 60's directors that the foundation accepting the \$87 million cash now available would not preclude later litigation.

The only way to resolve this, it seems, is to put it before a judge. But it all becomes moot if Chenu and Combet can do a deal that allows the foundation to compensate all victims without clawing back the \$1.9 billion pot of gold at the end of the litigation rainbow. As of Friday, this was as remote as it's ever been, with much stamping about in frustration and casting aspersions upon the other side.

Actually they have come a long way. Combet and Chenu, supported by the Hardie board, have agreed in principle on an amount to be paid to the foundation each year (around the \$80 million that it needs), based on an annual actuarial calculation and capped at a certain percentage of Hardie's annual cash flow.

The remaining problem concerns the unknown - that is, people who don't yet know they are dying of mesothelioma and haven't yet made a claim.

All concerned agree that the \$432 million estimated by David Jackson, QC, for legal costs, as part of his \$1.5 billion guess at the total potential liabilities, is too high. Essentially, the entire argument now centres on how to reduce it.

The Combet camp says Hardie's solution involves the company controlling the decisions about who gets what; the Hardie camp says that is not true - that it doesn't want to deny any future claimant due process but just streamline the process.

The Carr Government has now announced a review of the process to see if a way can be found to cut legal costs without short-circuiting anyone's rights. This may be easier said than done.

And what about the plight of Macphillamy, Trebeck and Don Cameron? They are simply three extra victims of James Hardie. The foundation is keeping alive the threat of suing Hardie and the directors personally for \$1.9 billion in order to focus their minds on reaching compromise with Combet on reducing asbestos claim legal costs.

It's as simple - and as complicated - as that.

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