

Hand-to-hand combat settling asbestos dispute

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Elisabeth Sexton goes behind the scenes as lawyers, unionists and asbestos victims haggle.

John Atanaskovic, feared Sydney solicitor to the powerful, has a new nickname.

Some know him as Antagonistic or Ratanaskovic or Atta the Hun. To his new friends among Labor lawyers, he's now John-Junior.

It's a reference to the photograph of Atanaskovic that appeared in this week's Sunday Telegraph, which the man himself would probably concede was taken long enough ago to look like a younger relative.

It's also a sign of affection by the ACTU, plaintiff lawyers and asbestos support groups for the role Atanaskovic played in getting his reviled client, James Hardie, across the negotiating line this week.

When formal talks on finding \$1.5 billion to pay future sufferers of asbestos diseases opened on October 1, James Hardie was still reeling from the fall-out of the Special Commission of Inquiry into its gross underfunding of an asbestos compensation foundation.

The chief executive Peter Macdonald and chief financial officer Peter Shafron had stepped aside three days earlier and would resign on October 22. The chairman Meredith Hellicar had been in the top job for five weeks and her fellow directors were struggling to come to terms with being in charge of the pariah of Australian business.

And was it really a good idea to begin the talks with John Morgan at the table? Morgan is a partner of Allens Arthur Robinson, the law firm which designed the complex restructure which caused so much grief to the unions and asbestos support groups.

For its part, Hardie was aggrieved that NSW premier Bob Carr had appointed as his chief negotiator ACTU secretary Greg Combet.

Not only was he a unionist, he was flanked by several key players from the "enemy camp" at the inquiry, including Slater & Gordon partner Peter Gordon and barrister Jack Rush, QC.

Into this atmosphere of guaranteed deep distrust, Hardie sent as its chief negotiator Peter Hunt, a principal of Sydney investment bank Caliburn Partnership.

But Hunt's riding instructions were to run a tough commercial negotiation. Armed with the board's rock-solid conviction, backed by the inquiry's findings, that James Hardie had no legal liability to compensate, he was primed to bargain down the amount to be spent.

Hardie also had the misplaced confidence that Carr disliked plaintiff lawyers as much as the company did and was itching to reduce the costs to NSW utilities with big asbestos liabilities like the rail and power companies.

The most recent expert estimate commissioned by Hardie is that its future compensation bill would be \$1.54 billion.

Of that, \$410 million would go to lawyers and \$230 million could be put down to increases in damages above the rate of inflation. If those costs could be eliminated entirely, the bill would be \$900 million.

Hunt was aiming for a result much closer to that number than \$1.5 billion.

He was naturally unimpressed to have at the table representatives of the very law firms whose income he was trying to cut.

He had a conventional aim - to achieve savings for his client - but the gusto with which he approached the task caused a lot of friction. He conducted research into the average incomes of plaintiff lawyers in his search for ways to cure the "outrageous", "absurd" and "bloated" common law compensation system.

Things got a bit nasty when he described plaintiff lawyers in a letter to the other side as "preying on asbestos victims".

Mostly the tone was kept cordial, though, because of the presence at the table of asbestosis sufferer Bernie Banton.

Banton also provided valuable advice on how various proposals would be received by asbestos support groups. Carr had made clear when he appointed Combet that he would not back a deal that would leave him open to criticism by this politically potent interest group.

The issue of Hardie's cost savings was a deal-breaker for both Banton and Combet.

Combet was not against Hardie saving money - he told the annual meeting in September a strong company was the best security asbestos victims could have - but he was implacably opposed to any changes to the compensation system which could reduce payments to victims.

He was particularly incensed by a condition in a version of the deal put forward by Hardie in early November that funding was conditional on initial cost savings of 60 per

cent. It also said funding would stop if continuous cost reductions did not follow.

He stopped talking to Hunt, communicating in writing.

On November 18 Combet broke the impasse by getting Carr to commission a review of the costs of the existing compensation system.

This caused some tension on his own side, with Labor law firms still feeling the pain from the government's reforms to workers compensation and tort law.

The dynamic improved but real progress was not achieved until new blood was infused. The key arrival was Russell Chenu, who was appointed Hardie's interim chief financial officer three weeks after the talks began.

He did not take the leading role in the negotiations until late November, but when he did, he and Combet hit it off.

They had several sessions on their own, at which he committed Hardie to living with the cost savings identified in the government review.

Another member of the Hardie team with Combet's trust was Melbourne solicitor Leon Zwier, a partner with Arnold Bloch Leibler. Zwier had tangled with Combet on behalf of other big clients such as Patrick Corp and the administrators of Ansett. His client base of executives like Elders IXL's Peter Scanlon and Trevor Kennedy did not do much for his credentials with the plaintiff lawyers but Combet knew he could take Zwier at his word.

Hardie hired him in a gesture of goodwill more as a facilitator than a legal adviser and Chenu gave him authority to deal one-on-one with Combet.

For its part Hardie welcomed the arrival of the ACTU's investment banker, Brian Wilson from Lazard Pty Ltd, although it meant dropping their muttering about how frustrating it was trying to negotiate with a union leader who by definition was innumerate and naive about commercial life.

Another breakthrough came during what Combet called the "distraction" of court action by the Medical Research and Compensation Foundation.

In a blaze of publicity, the foundation asked the NSW Supreme Court to appoint a provisional liquidator, creating high anxiety that compensation funds would be frozen.

Suddenly the two sides had an urgent common interest. Both sent senior barristers into court on December 2 to argue against liquidation and Zwier and Atanaskovic spent much of the hearing huddled with ACTU in-house lawyer Steven Jones.

The ACTU even offered to find replacement directors so the foundation could stay afloat.

Hardie's counsel, Tom Bathurst, QC, told Justice Peter Young that ACTU appointees would "give the foundation the opportunity to act responsibly".

"Yes, it's interesting that the two of you are so chummy today," Judge Young remarked.

Indeed by then the negotiating teams had overcome the initial deep distrust. Morgan had disappeared after the costs issue was taken off the table and Atanaskovic had developed a rapport with Slater & Gordon partner Ken Fowlie, with whom he shared drafting and re-drafting duties. They called each other Bruce and Kevin.

Another key legal brain was the deputy director of the Cabinet Office, Leigh Sanderson, who joined the talks when conditions began to be inserted which could only be met by government.

By now many of the face-to-face talks were replaced by "cold towel readings", undertaken in the privacy of each team's office.

The last one took place late last Monday night.

Combet, Fowlie, Jones and the ACTU's George Wright took a break for a quick dinner at Karma's Indian Restaurant.

They repaired to Sanderson's nearby office to consider the absolutely, definitely, positively last draft. It got the thumbs up.