

Biggest loss was in court of public opinion

Chris Merritt

Australian Financial Review

22 December 2004

© 2004 Copyright John Fairfax Holdings Limited.

James Hardie spent tens of millions of dollars trying to avoid asbestos liabilities. Yesterday it proved that every cent was wasted.

Despite all the money this company spent on high-priced lawyers and spin doctors, it is now saddled with an onerous asbestos settlement and responsibility for establishing yet another compensation fund.

Hardie has suffered a massive defeat. It tried and failed to avoid all liability for its products, then it tried and failed to cap those liabilities.

But its biggest defeat was in the court of public opinion.

James Hardie will forever be known as the company that tried to use the law to avoid compensating people who were dying because they used the company's products.

The big lesson from Hardie's defeat is that it took place despite the fact that the legal structure that insulates the company from asbestos liabilities still appears to be bullet-proof.

This simply proves that lawyers are not the font of all knowledge. Corporate structures based on clever lawyering count for nothing if the substance of a company's actions are indefensible.

James Hardie fell foul of the smell test and everyone could see that except the company, its lawyers and its spin doctors.

Because of that it has lost its chief executive, its chief financial officer, its reputation and millions of dollars in market capitalisation.

The utter waste is best illustrated by the fact that part of the scheme approved yesterday involves the creation of another compensation fund.

Had the company provided adequate funding originally when it folded its asbestos subsidiaries into the Medical Research and Compensation Foundation, there would have been no need for a second fund.

The new one will have recourse to open-ended funding from the company, while the original MRCF was given a fixed amount of money and soon realised it had been short-changed to the tune of \$1.5 billion.

The worst aspect of Hardie's defeat is that the company has lost its freedom of action. For the next 70 years, James Hardie's actions will be restricted by an enforceable covenant with the NSW government.

Normally, such invasive action directed at a single company would be a cause for concern. But an asbestos settlement with James Hardie that does not include enforcement provisions would have been meaningless.

When Meredith Hellicar explains this settlement to her shareholders, she should keep in mind that shareholders would have been far better off had the company lived up to its responsibilities in the first place instead of seeking solace from lawyers.