

Fresh go at Hardie granted

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THE asbestos campaigner Bernie Banton has been given the go-ahead to pursue extra "punishment" damages for James Hardie's much maligned 2001 corporate restructure as part of his compensation claim for the lethal mesothelioma he contracted in August.

The NSW Court of Appeal said yesterday Mr Banton, now gravely ill in hospital, could be entitled to additional payment if the Dust Diseases Tribunal decided it strongly disapproved of the way James Hardie set up an underfunded compensation trust in February 2001.

Three appeal court judges said the tribunal, which will begin hearing Mr Banton's claim today,

could express its disapproval of James Hardie's attempt to cut its links with asbestos by awarding so-called "exemplary" damages.

Justice David Hodgson defined exemplary damages as "punishment for actions in contemptuous disregard for a plaintiff's rights" designed to deter future wrongdoing.

"In this particular case, it could be said to be in contemptuous disregard for a plaintiff's rights for a defendant to put itself in a position where it cannot satisfy a plaintiff's appropriate claim for compensation," Justice Hodgson said.

When a \$1.5 billion shortfall in the 2001 trust was exposed in 2003, James Hardie said it would not pay those claimants who missed out. After a public furore,

conduct when Mr Banton worked in its factory at Camellia, near Parramatta, from 1968 to 1974.

But they agreed with Mr Williams that Mr Banton had already received exemplary damages for that period. This was because Mr Banton contracted the less serious disease asbestosis in 1999 and was paid \$800,000 compensation in 2000.

Mr Banton's barrister, Jack Rush, QC, argued that although his client's 2000 case included a claim for exemplary damages, the out-of-court settlement did not include any payment for exemplary damages. But the appeal judges yesterday ruled the 2000 payment was not, and legally could not be, "fragmented".

Exemplary damages had been



Gravely ill ... Bernie Banton.

in which Mr Banton played a leading role, it set up a second trust that began operating in February.

The appeal judges dismissed an argument by the trust's barrister, David Williams, SC, that exemplary damages could only be awarded for James Hardie's

"merged" into the \$800,000 damages award, Justice Hodgson said. "Care must be taken to avoid double-counting."

Mr Banton's claim is being handled jointly by James Hardie's workers compensation insurer in the 1960s and 70s, Allianz Australia, and the new trust set up in February, the Asbestos Injuries Compensation Fund. Allianz made a settlement offer for loss of income, medical expenses and home care on October 31. The fund challenged Mr Banton's right to pursue exemplary damages.

Justice Hodgson said the court had been told Mr Banton was "now gravely ill" so the court gave its decision yesterday. The full reasons will not be published for some weeks.