

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST**

No 2097 of 2003
F.5628

B E T W E E N

**ANSETT AUSTRALIA LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT)
(ACN 004 209 410)**

Plaintiff

and

FLIGHT CENTRE LIMITED (ACN 003 377 188)

First defendant

AND OTHERS
(by original proceeding)

A N D B E T W E E N

FLIGHT CENTRE LIMITED (ACN 003 377 188)

First Plaintiff

AND OTHERS

and

**ANSETT AUSTRALIA LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT)
(ACN 004 209 410)**

Defendant

(by counterclaim)

DEFENCE AND COUNTERCLAIM

Date of document: 4 March 2003

Filed on behalf of: The defendants (and plaintiffs by counterclaim)

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DEFENCE

To the plaintiff's statement of claim dated 4 December 2003, the defendants say as follows (with terms defined in the statement of claim having the same meanings when used herein):

1. Except to the extent stated to the contrary in this pleading, the defendants deny each and every allegation relating to them (including implied allegations) contained in the statement of claim.
2. The defendants admit paragraph 1.
3. The first defendant (**Flight Centre**) admits paragraph 2.
4. The second defendant (**ITG**) admits paragraph 3.
5. The third defendant (**FFPL**) admits paragraph 4.
6. As to paragraph 5, the defendants admit sub-paragraph (a) and each defendant admits the sub-paragraph relating to that defendant.
7. Each defendant admits the sub-paragraph of paragraph 6 relating to that defendant.
8. The defendants admit paragraph 7.
9. Each defendant admits the opening words of paragraph 8 and the sub-paragraph of paragraph 8 relating to that defendant.
10. Each defendant admits the opening words of paragraph 9 and the sub-paragraph of paragraph 9 relating to that defendant.
11. As to paragraph 10:
 - (a) Save that they deny that the word "hereunder" in the last sentence of sub-paragraph 7.2 of the PSAA means "under the PSAA" as alleged in paragraph 10(g) of the statement of claim, the defendants admit paragraph 10;
 - (b) Further, the defendants say that there were additional terms and conditions of the PSAA, amongst others, as follows:
 - (i) for the sale of air transportation and ancillary services by the Agent under the PSAA the Carrier shall remunerate the Agent in a manner and amount as may be stated from time to time and communicated to the Agent by the Carrier (paragraph 9 of the PSAA);
 - (ii) the Carrier agrees to indemnify and hold harmless the Agent, its officers and employees from and against liability for any loss, injury or damage, whether direct, indirect or consequential, arising in the course of transportation or other ancillary services provided by the Carrier pursuant to a sale made by the Agent or arising from the

- failure of the Carrier to provide such transportation or services, except to the extent that such loss, injury or damage is caused or contributed to by the Agent, its officers, employees or any other person acting on the Agent's behalf (sub-paragraph 15.1 of the PSAA);
- (iii) where applicable, the term "commission" when used in the PSAA shall be deemed to include any form of remuneration (resolution 824a incorporated into the PSAA by sub-paragraph 2.1(b) of the PSAA);
 - (iv) notwithstanding sub-paragraph 7.2, and other provisions, of the PSAA, the Agent shall not be required to collect, nor to pay or remit to the Carrier, moneys in respect of transportation or other services sold by it on behalf of the Carrier to which, as against those who contracted for the services, the Carrier is not entitled or ceases to be entitled because it will not provide the services or otherwise;
 - (v) notwithstanding sub-paragraph 7.2, and other provisions, of the PSAA, if the Agent collects moneys in respect of transportation or other services sold by it on behalf of the Carrier to which, as against those who contracted for the services, the Carrier is not entitled or ceases to be entitled, because it will not provide the services or otherwise, the Agent does not hold those moneys on trust for the Carrier and instead holds them on trust for the persons from whom they were collected;
 - (vi) notwithstanding sub-paragraph 7.2, and other provisions, of the PSAA, if the Agent collects moneys in respect of transportation or other services sold by it on behalf of the Carrier to which, as against those who contracted for the services, the Carrier is not entitled or ceases to be entitled, because it will not provide the services or otherwise, the Agent is entitled to refund those moneys to the persons from whom they were collected;
 - (vii) the Carrier is not entitled to instruct the Agent that it is not entitled to deduct commission pursuant to sub-paragraph 7.2 of the PSAA:
 - (A) after the Agent's entitlement to the commission has arisen, or alternatively after the Agent has collected the moneys to which the commission entitlement relates; or

- (B) alternatively to sub-paragraph (A) above, after a reasonable time has passed since the Agent's entitlement to the commission arose, or alternatively after a reasonable time has passed since the Agent collected the moneys to which the commission entitlement relates;
- (viii) the Carrier must act in good faith in giving any instruction to the Agent that it is not entitled to deduct commission pursuant to sub-paragraph 7.2 of the PSAA;
- (ix) the Carrier is not entitled to instruct the Agent that it is not entitled to deduct commission pursuant to sub-paragraph 7.2 of the PSAA if the purpose of the instruction is to prevent the Agent from obtaining the commission or otherwise defeat the entitlement to commission.

PARTICULARS

The terms and conditions alleged in sub-paragraphs (iv), (v) and (vi) were to be implied in order to give business efficacy to the PSAA.

The terms and conditions alleged in sub-paragraphs (vii), (viii) and (ix) were to be implied to give business efficacy to the PSAA. Further or alternatively, they were implied by operation of law as an incident of the implied obligation of good faith in contractual performance. Further or alternatively, they were implied as an incident of the implied obligation that a contracting party will cooperate to ensure that the other party is not denied the benefits contracted for.

12. The defendants admit paragraph 11.
13. The defendants admit paragraph 12.
14. Flight Centre does not admit paragraph 13.
15. As to paragraph 14:
- (a) Flight Centre admits that on or after 27 August 2001 it collected certain amounts payable for the transportation or other services sold by it on behalf of Ansett in respect of certain of the First Traffic Documents (the **Flight Centre Moneys**);
- (b) Flight Centre otherwise denies paragraph 14;
- (c) Further, Flight Centre says that:
- (i) as to that portion of the Flight Centre Moneys which related to travel which was not availed by Ansett's customers (the **Flight Centre**

Unavailed Moneys), Ansett has never provided the transportation or other services to which the individual amounts comprising that amount related and, given the suspension on 14 September 2001 and subsequent permanent cessation of Ansett's flight services (the **Ansett Collapse**), will never provide those services; and

- (ii) as to the balance of the Flight Centre Moneys after deducting the Flight Centre Unavailed Moneys (the net amount hereinafter referred to as the **Flight Centre Availed Moneys**), Ansett has provided the transportation or other services to which the individual amounts comprising that amount related.

16. As to paragraph 15:

- (a) Flight Centre admits that, subject to paragraphs 54 to 98 (inclusive) of this pleading, to which it refers and which it repeats, and less the amounts of the Flight Centre Base Commission, Flight Centre Override Commission, Flight Centre Merchant Amount, the Domestic Ticket Fund and the Flight Centre ACMs as referred to in those paragraphs (together the **Flight Centre Deductions** and each a **Flight Centre Deduction**), the Flight Centre Availed Moneys became on collection and remain the property of Ansett and are held by Flight Centre in trust for Ansett until satisfactorily accounted for to Ansett and settlement made (the amount constituted by the Flight Centre Availed Moneys less the Flight Centre Deductions being hereinafter referred to as the **Flight Centre Net Availed Moneys**);
- (b) Flight Centre otherwise denies paragraph 15;
- (c) Further, Flight Centre says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the persons, who had contracted with Ansett for the First Traffic Documents to which the Flight Centre Unavailed Moneys related (the **Flight Centre Payors**), had so contracted; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:

- (A) the Flight Centre Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the Flight Centre Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the Flight Centre Payors, ceased to be entitled, and has not been entitled, to the Flight Centre Unavailed Moneys or any part thereof;
- (iii) as a result:
- (A) upon the Ansett Collapse, the Flight Centre Unavailed Moneys collected by Flight Centre to that time, which had hitherto been held by Flight Centre under the trust for Ansett arising pursuant to sub-paragraph 7.2 of the PSAA (the ***Flight Centre Trust***) ceased to be so held; and
 - (B) from the time of the Ansett Collapse, the Flight Centre Unavailed Moneys, whether collected by Flight Centre before or after the Ansett Collapse, were held, and (leaving aside the Flight Centre Chargeback Amount as referred to in paragraph 16(f) of this pleading) they continue to be held, on trust by Flight Centre for the Flight Centre Payors; and
- (iv) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the Flight Centre Unavailed Moneys or any part thereof;
- (d) Further or alternatively to paragraph 16(c) of this pleading, Flight Centre says as follows:
- (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the Flight Centre Payors had contracted with Ansett for the First Traffic Documents to which the Flight Centre Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:

- (A) the Flight Centre Payors, at common law and/or under the *Frustrated Contracts Act 1959* (Vic), became entitled, as against Ansett, to the Flight Centre Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the Flight Centre Payors, ceased to be entitled, and has not been entitled, to the Flight Centre Unavailed Moneys or any part thereof; and
- (iii) in the premises:
- (A) pursuant to the term of the PSAA set out in paragraph 11(b)(v) of this pleading, from the time of the Ansett Collapse Flight Centre has not held the Flight Centre Unavailed Moneys or any part thereof on trust for Ansett and instead (leaving aside the Flight Centre Chargeback Amount as referred to in paragraph 16(f) of this pleading) has held those moneys, whether collected by Flight Centre before or after the Ansett Collapse, on trust for the Flight Centre Payors; and
 - (B) Ansett therefore does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the Flight Centre Unavailed Moneys or any part thereof.
- (e) Further or alternatively to paragraphs 16(c) and 16(d) of this pleading, Flight Centre says as follows:
- (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the Flight Centre Payors had contracted with Ansett for the First Traffic Documents to which the Flight-Centre Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:

- (A) it has been and is unconscionable for Ansett to have or to claim any beneficial interest in the Flight Centre Unavailed Moneys or any part of them;
- (B) Ansett is or would be unjustly enriched, at the expense of the Flight Centre Payors, by the amount of any beneficial interest (if any, which is denied) in the Flight Centre Unavailed Moneys;
- (C) as a result, if, which is denied, Flight Centre holds the Flight Centre Unavailed Moneys or any part of them upon trust for Ansett, whether pursuant to the Flight Centre Trust or otherwise, Ansett's interest in the Flight Centre Unavailed Moneys under such trust is and at all times since the Ansett Collapse has been held by Ansett on constructive sub-trust for the benefit of the Flight Centre Payors (the **Flight Centre Constructive Trust**);
- (D) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the Flight Centre Unavailed Moneys or any part thereof;
- (E) the Flight Centre Constructive Trust is and since arising has at all times been a bare trust, under which Ansett has and has had no duties other than to pay to the Flight Centre Payors the Flight Centre Unavailed Moneys; and
- (F) in the circumstances, the Flight Centre Unavailed Moneys, whether collected by Flight Centre before or after the Ansett Collapse, and leaving aside the Flight Centre Chargeback Amount as referred to in paragraph 16(f) of this pleading, are, and from the time of the Ansett Collapse have been, in substance and in effect, held by Flight Centre on trust for the Flight Centre Payors and, for the purposes of this proceeding and otherwise, are in equity to be treated as held by Flight Centre on trust for the Flight Centre Payors.

(f) Further:

- (i) following the Ansett Collapse, Flight Centre was entitled:

- (A) pursuant to the term of the PSAA alleged in paragraph 11(b)(v) of this pleading;
- (B) further or alternatively, by reason of the matters alleged in paragraph 16(c) of this pleading;
- (C) further or alternatively, by reason of the matters alleged in paragraph 16(d) of this pleading; and
- (D) further or alternatively, by reason of the matters alleged in paragraph 16(e) of this pleading,

to refund to Flight Centre Payors the respective amounts of the Flight Centre Unavailed Moneys that Flight Centre had collected from them;

- (ii) if the moneys which were received by Flight Centre and which were the subject of chargebacks by the Flight Centre Payors comprised part of the Flight Centre Moneys (which is denied), following the Ansett Collapse, and as it was entitled to do as alleged in paragraph 16(f)(i) above, Flight Centre refunded to Flight Centre Payors \$364,544.86 (the ***Flight Centre Chargeback Amount***) of the Flight Centre Unavailed Moneys; and
- (iii) as a result, of the Flight Centre Unavailed Moneys, since making the refunds referred to in sub-paragraph (ii) above Flight Centre has held, and it now holds, only the amount constituted by the Flight Centre Unavailed Moneys less the Flight Centre Chargeback Amounts (the ***Flight Centre Net Unavailed Moneys***).

17. ITG does not admit paragraph 16.

18. As to paragraph 17:

- (a) ITG admits that on or after 27 August 2001 it collected certain amounts payable for the transportation or other services sold by it on behalf of Ansett in respect of certain of the Second Traffic Documents (the ***ITG Moneys***);
- (b) ITG otherwise denies paragraph 17;
- (c) Further, ITG says that:
 - (i) as to that portion of the ITG Moneys which related to travel which was not availed by Ansett's customers (the ***ITG Unavailed***

Moneys), Ansett has never provided the transportation or other services to which the individual amounts comprising that amount related and, given the Ansett Collapse will never provide those services; and

- (ii) as to the balance of the ITG Moneys after deducting the ITG Unavailed Moneys (the net amount hereinafter referred to as the **ITG Aailed Moneys**), Ansett has provided the transportation or other services to which the individual amounts comprising that amount related.

19. As to paragraph 18:

- (a) ITG admits that, subject to paragraphs 99 to 133 (inclusive) of this pleading, to which it refers and which it repeats, and less the amounts of the ITG Base Commission, ITG Override Commission, ITG Subvention Amount and ITG ACMs as referred to in those paragraphs (together the **ITG Deductions** and each an **ITG Deduction**), the ITG Aailed Moneys became on collection and remain the property of Ansett and are held by ITG in trust for Ansett until satisfactorily accounted for to Ansett and settlement made (the amount constituted by the ITG Aailed Moneys less the ITG Deductions being hereinafter referred to as the **ITG Net Aailed Moneys**);
- (b) ITG otherwise denies paragraph 18;
- (c) Further, ITG says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the persons, who had contracted with Ansett for the Second Traffic Documents to which the ITG Unavailed Moneys related (the **ITG Payors**), had so contracted; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:
 - (A) the ITG Payors, at common law and/or under the *Frustrated Contracts Act* 1959 (Vic), became entitled, as against Ansett, to the ITG Unavailed Moneys; and

- (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the ITG Payors, ceased to be entitled, and has not been entitled, to the ITG Unavailed Moneys or any part thereof;
- (iii) as a result:
 - (A) upon the Ansett Collapse, the ITG Unavailed Moneys collected by ITG to that time, which had hitherto been held by ITG under the trust for Ansett arising pursuant to subparagraph 7.2 of the PSAA (the *ITG Trust*) ceased to be so held; and
 - (B) from the time of the Ansett Collapse, the ITG Unavailed Moneys, whether collected by ITG before or after the Ansett Collapse, were held, and they continue to be held, on trust by ITG for the ITG Payors; and
- (iv) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the ITG Unavailed Moneys or any part thereof;
- (d) Further or alternatively to paragraph 19(c) of this pleading, ITG says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the ITG Payors had contracted with Ansett for the Second Traffic Documents to which the ITG Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:
 - (A) the ITG Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the ITG Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the ITG Payors, ceased to be entitled, and has not been entitled, to the ITG Unavailed Moneys or any part thereof; and

- (iii) in the premises:
 - (A) pursuant to the term of the PSAA set out in paragraph 11(b)(v) of this pleading, from the time of the Ansett Collapse ITG has not held the ITG Unavailed Moneys or any part thereof on trust for Ansett and instead has held those moneys, whether collected by ITG before or after the Ansett Collapse, on trust for the ITG Payors; and
 - (B) Ansett therefore does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the ITG Unavailed Moneys or any part thereof;
- (e) Further or alternatively to paragraphs 19(c) and 19(d) of this pleading, ITG says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the ITG Payors had contracted with Ansett for the Second Traffic Documents to which the ITG Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:
 - (A) it has been and is unconscionable for Ansett to have or to claim any beneficial interest in the ITG Unavailed Moneys or any part of them;
 - (B) Ansett is or would be unjustly enriched, at the expense of the ITG Payors, by the amount of any beneficial interest (if any, which is denied) in the ITG Unavailed Moneys;
 - (C) as a result, if, which is denied, ITG holds the ITG Unavailed Moneys or any part of them upon trust for Ansett, whether pursuant to the ITG Trust or otherwise, Ansett's interest in the ITG Unavailed Moneys under such trust is and at all times since the Ansett Collapse has been held by Ansett on constructive sub-trust for the benefit of the ITG Payors (the **ITG Constructive Trust**);

- (D) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the ITG Unavailed Moneys or any part thereof;
- (E) the ITG Constructive Trust is and since arising has at all times been a bare trust, under which Ansett has and has had no duties other than to pay to the ITG Payors the ITG Unavailed Moneys; and
- (F) in the circumstances, the ITG Unavailed Moneys, whether collected by ITG before or after the Ansett Collapse, are, and from the time of the Ansett Collapse have been, in substance and in effect, held by ITG on trust for the ITG Payors and, for the purposes of this proceeding and otherwise, are in equity to be treated as held by ITG on trust for the ITG Payors;

(f) Further:

(i) following the Ansett Collapse, ITG was entitled:

- (A) pursuant to the term of the PSAA alleged in paragraph 11(b)(v) of this pleading;
- (B) further or alternatively, by reason of the matters alleged in paragraph 19(c) of this pleading;
- (C) further or alternatively, by reason of the matters alleged in paragraph 19(d) of this pleading; and
- (D) further or alternatively, by reason of the matters alleged in paragraph 19(e) of this pleading,

to refund to ITG Payors the respective amounts of the ITG Unavailed Moneys that ITG had collected from them.

20. FFPL does not admit paragraph 19.

21. As to paragraph 20:

- (a) FFPL admits that on or after 27 August 2001 it collected certain amounts payable for the transportation or other services sold by it on behalf of Ansett in respect of certain of the Third Traffic Documents (the **FFPL Moneys**);
- (b) FFPL otherwise denies paragraph 20;

- (c) Further, FFPL says that:
- (i) as to that portion of the FFPL Moneys which related to travel which was not availed by Ansett's customers (the **FFPL Unavailed Moneys**), Ansett has never provided the transportation or other services to which the individual amounts comprising that amount related and, given the Ansett Collapse will never provide those services; and
 - (ii) as to the balance of the FFPL Moneys after deducting the FFPL Unavailed Moneys (the net amount hereinafter referred to as the **FFPL Availed Moneys**), Ansett has provided the transportation or other services to which the individual amounts comprising that amount related.

22. As to paragraph 21:

- (a) FFPL admits that, subject to paragraphs 134 to 165 (inclusive) of this pleading, to which it refers and which it repeats, and less the amounts of the FFPL Base Commission, FFPL Override Commission and FFPL Subvention Amount as referred to in those paragraphs (together the **FFPL Deductions** and each a **FFPL Deduction**), the FFPL Availed Moneys became on collection and remain the property of Ansett and are held by FFPL in trust for Ansett until satisfactorily accounted for to Ansett and settlement made (the amount constituted by the FFPL Availed Moneys less the FFPL Deductions being hereinafter referred to as the **FFPL Net Availed Moneys**);
- (b) FFPL otherwise denies paragraph 21;
- (c) Further, FFPL says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the persons, who had contracted with Ansett for the Third Traffic Documents to which the FFPL Unavailed Moneys related (the **FFPL Payors**), had so contracted; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:

- (A) the FFPL Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the FFPL Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the FFPL Payors, ceased to be entitled, and has not been entitled, to the FFPL Unavailed Moneys or any part thereof;
- (iii) as a result:
- (A) upon the Ansett Collapse, the FFPL Unavailed Moneys collected by FFPL to that time, which had hitherto been held by FFPL under the trust for Ansett arising pursuant to subparagraph 7.2 of the PSAA (the *FFPL Trust*) ceased to be so held; and
 - (B) from the time of the Ansett Collapse, the FFPL Unavailed Moneys, whether collected by FFPL before or after the Ansett Collapse, were held, and they continue to be held, on trust by FFPL for the FFPL Payors; and
- (iv) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the FFPL Unavailed Moneys or any part thereof;
- (d) Further or alternatively to paragraph 22(c) of this pleading, FFPL says as follows:
- (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the FFPL Payors had contracted with Ansett for the Third Traffic Documents to which the FFPL Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:
 - (A) the FFPL Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the FFPL Unavailed Moneys; and

- (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(v) of this pleading, Ansett, as against the FFPL Payors, ceased to be entitled, and has not been entitled, to the FFPL Unavailed Moneys or any part thereof; and
- (iii) in the premises:
 - (A) pursuant to the term of the PSAA set out in paragraph 11(b)(v) of this pleading, from the time of the Ansett Collapse FFPL has not held the FFPL Unavailed Moneys or any part thereof on trust for Ansett and instead has held those moneys, whether collected by FFPL before or after the Ansett Collapse, on trust for the FFPL Payors; and
 - (B) Ansett therefore does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the FFPL Unavailed Moneys or any part thereof;
- (e) Further or alternatively to paragraphs 22(c) and 22(d) of this pleading, FFPL says as follows:
 - (i) upon and because of the Ansett Collapse:
 - (A) there was a total failure of the consideration for which the FFPL Payors had contracted with Ansett for the Third Traffic Documents to which the FFPL Unavailed Moneys related; and
 - (B) those contracts became impossible of performance and were accordingly frustrated and discharged;
 - (ii) accordingly, from the time of the Ansett Collapse:
 - (A) it has been and is unconscionable for Ansett to have or to claim any beneficial interest in the FFPL Unavailed Moneys or any part of them;
 - (B) Ansett is or would be unjustly enriched, at the expense of the FFPL Payors, by the amount of any beneficial interest (if any, which is denied) in the FFPL Unavailed Moneys;

- (C) as a result, if, which is denied, FFPL holds the FFPL Unavailed Moneys or any part of them upon trust for Ansett, whether pursuant to the FFPL Trust or otherwise, Ansett's interest in the FFPL Unavailed Moneys under such trust is and at all times since the Ansett Collapse has been held by Ansett on constructive sub-trust for the benefit of the FFPL Payors (the **FFPL Constructive Trust**);
 - (D) in the premises, Ansett does not have, and since the time of the Ansett Collapse has not had, any beneficial interest in or entitlement to the FFPL Unavailed Moneys or any part thereof;
 - (E) the FFPL Constructive Trust is and since arising has at all times been a bare trust, under which Ansett has and has had no duties other than to pay to the FFPL Payors the FFPL Unavailed Moneys; and
 - (F) in the circumstances, the FFPL Unavailed Moneys, whether collected by FFPL before or after the Ansett Collapse, are, and from the time of the Ansett Collapse have been, in substance and in effect, held by FFPL on trust for the FFPL Payors and, for the purposes of this proceeding and otherwise, are in equity to be treated as held by FFPL on trust for the FFPL Payors;
- (f) Further:
- (i) following the Ansett Collapse, FFPL was entitled:
 - (A) pursuant to the term of the PSAA alleged in paragraph 11(b)(v) of this pleading;
 - (B) further or alternatively, by reason of the matters alleged in paragraph 22(c) of this pleading;
 - (C) further or alternatively, by reason of the matters alleged in paragraph 22(d) of this pleading; and
 - (D) further or alternatively, by reason of the matters alleged in paragraph 22(e) of this pleading,
- to refund to FFPL Payors the respective amounts of the FFPL Unavailed Moneys that FFPL had collected from them.

23. As to paragraph 22:

- (a) Flight Centre admits that by the statement of claim Ansett demands that Flight Centre as trustee pay to Ansett the First Moneys;
- (b) Flight Centre admits that Ansett has made the demands particularised below that Flight Centre pay to Ansett the First Moneys;

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- (1) Letter dated 19 March 2002 to Flight Centre from Andersen Legal, solicitors for Ansett, demanding payment of an unquantified amount in respect of availed travel.
 - (2) Letters to Flight Centre dated 8 May 2002 from Andersen Legal, and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett, demanding payment of the First Moneys.
- (c) Flight Centre otherwise denies paragraph 22.

24. As to paragraph 23:

- (a) ITG admits that by the statement of claim Ansett demands that ITG as trustee pay to Ansett the Second Moneys;
- (b) ITG admits that Ansett has made the demands particularised below that ITG pay to Ansett the Second Moneys;

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- (1) Letter dated 19 March 2002 to ITG from Andersen Legal, solicitors for Ansett, demanding payment of an unquantified amount in respect of availed travel.
 - (2) Letters to ITG dated 10 May 2002 from Andersen Legal, and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett, demanding payment of the Second Moneys.
- (c) ITG otherwise denies paragraph 23.

25. As to paragraph 24:

- (a) FFPL admits that by the statement of claim Ansett demands that FFPL as trustee pay to Ansett the Third Moneys;
- (b) FFPL otherwise denies paragraph 24.

26. As to paragraph 25:

- (a) Flight Centre admits that it has not paid the First Moneys to Ansett;

- (b) Flight Centre otherwise denies paragraph 25;
- (c) Flight Centre says that, other than the Flight Centre Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the Flight Centre Moneys or the First Moneys.

27. As to paragraph 26:

- (a) ITG admits that it has not paid the Second Moneys to Ansett;
- (b) ITG otherwise denies paragraph 26;
- (c) ITG says that, other than the ITG Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the ITG Moneys or the Second Moneys.

28. As to paragraph 27:

- (a) FFPL admits that it has not paid the Third Moneys to Ansett;
- (b) FFPL otherwise denies paragraph 27;
- (c) FFPL says that, other than the FFPL Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the FFPL Moneys or the Third Moneys.

29. As to paragraph 28:

- (a) Save that Flight Centre admits that it holds the Flight Centre Net Availed Moneys on trust for Ansett and that Ansett is entitled to those moneys, Flight Centre denies sub-paragraphs (a) and (b).
- (b) Save that ITG admits that it holds the ITG Net Availed Moneys on trust for Ansett and that Ansett is entitled to those moneys, ITG denies sub-paragraphs (c) and (d).
- (c) Save that FFPL admits that it holds the FFPL Net Availed Moneys on trust for Ansett and that Ansett is entitled to those moneys, FFPL denies sub-paragraphs (e) and (f).

30. As to paragraph 29:

- (a) Flight Centre:
 - (i) admits that it holds the Flight Centre Net Availed Moneys in trust for Ansett and that Ansett is entitled to the Flight Centre Net Availed Moneys;

- (ii) does not admit that Flight Centre is liable to account to Ansett for the Flight Centre Net Availed Moneys; and
 - (iii) otherwise denies sub-paragraphs (a) and (b) of paragraph 29.
- (b) ITG:
- (i) admits that it holds the ITG Net Availed Moneys in trust for Ansett and that Ansett is entitled to the ITG Net Availed Moneys;
 - (ii) does not admit that ITG is liable to account to Ansett for the ITG Net Availed Moneys; and
 - (iii) otherwise denies sub-paragraphs (c) and (d) of paragraph 29.
- (c) FFPL:
- (i) admits that it holds the FFPL Net Availed Moneys in trust for Ansett and that Ansett is entitled to the FFPL Net Availed Moneys;
 - (ii) does not admit that Flight Centre is liable to account to Ansett for the FFPL Net Availed Moneys; and
 - (iii) otherwise denies sub-paragraphs (e) and (f) of paragraph 29.
31. As to paragraph 30:
- (a) Flight Centre:
- (i) admits that it has not paid the First Moneys to Ansett;
 - (ii) does not admit that its non-payment to Ansett of the Flight Centre Net Availed Moneys constitutes a breach of trust or that Ansett is entitled to equitable compensation in respect of that non-payment;
 - (iii) otherwise denies paragraph 30(a); and
 - (iv) says that other than the Flight Centre Net Availed Moneys it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the Flight Centre Moneys or the First Moneys.
- (b) ITG:
- (i) admits that it has not paid the Second Moneys to Ansett;
 - (ii) does not admit that its non-payment to Ansett of the ITG Net Availed Moneys constitutes a breach of trust or that Ansett is entitled to equitable compensation in respect of that non-payment;

- (iii) otherwise denies paragraph 30(b); and
 - (iv) says that other than the ITG Net Aailed Moneys it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the ITG Moneys or the Second Moneys.
- (c) FFPL:
- (i) admits that it has not paid the Third Moneys to Ansett;
 - (ii) does not admit that its non-payment to Ansett of the FFPL Net Aailed Moneys constitutes a breach of trust or that Ansett is entitled to equitable compensation in respect of that non-payment;
 - (iii) otherwise denies paragraph 30(c); and
 - (iv) says that other than the FFPL Net Aailed Moneys it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the FFPL Moneys or the Third Moneys.
32. As to paragraph 31:
- (a) Flight Centre refers to and repeats paragraph 14 of this pleading;
 - (b) Flight Centre admits that upon the issue by it of such of the First Traffic Documents as it issued, and prior to the Ansett Collapse, it was responsible for payment, in accordance with the PSAA and any other applicable contractual arrangements between Ansett and Flight Centre, of the Flight Centre Moneys to Ansett;
 - (c) Flight Centre says that:
 - (i) prior to the Ansett Collapse, under the terms of the PSAA, no amount of the Flight Centre Moneys had become due to be remitted to Ansett; and
 - (ii) further or alternatively, if, which is denied, prior to the Ansett Collapse any amount of the Flight Centre Moneys had become due to be remitted to Ansett, upon the Ansett Collapse such amount (other than any amount of the Flight Centre Net Aailed Moneys) ceased to be due to be remitted to Ansett, by reason of the matters alleged in the remainder of this paragraph 32;
 - (d) Flight Centre:

- (i) admits that, under the PSAA, since the time of the Ansett Collapse, and subject to paragraphs 54 to 98 (inclusive) of this pleading, to which it refers and which it repeats, the Flight Centre Aailed Moneys have become due to be remitted by it to Ansett, less the Flight Centre Deductions and each of them; and
 - (ii) therefore admits that the amount of the Flight Centre Net Aailed Moneys is due by it to Ansett;
- (e) Flight Centre otherwise denies paragraph 31;
- (f) Further, Flight Centre:
- (i) refers to and repeats paragraph 16(c) of this pleading; and
 - (ii) says that, in the premises, since the Ansett Collapse, no amount of the Flight Centre Unavailed Moneys can be due to Ansett and Flight Centre cannot be responsible to pay any amount of the Flight Centre Unavailed Moneys to Ansett;
- (g) Further, and in the alternative to paragraph 32(f) of this pleading, Flight Centre:
- (i) refers to and repeats paragraph 16(d) of this pleading;
 - (ii) says that, accordingly, from the time of the Ansett Collapse:
 - (A) the Flight Centre Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the Flight Centre Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, Ansett, as against the Flight Centre Payors, ceased to be entitled, and has not been entitled, to the Flight Centre Unavailed Moneys or any part thereof; and
 - (iii) says that, in the premises, pursuant to the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, from the time of the Ansett Collapse, Flight Centre has not been and is not required to collect, nor to pay or remit to Ansett, the Flight Centre Unavailed Moneys or any part thereof;
- (h) Further, and in the alternative to paragraphs 32(f) and 32(g) of this pleading, Flight Centre:

- (i) refers to and repeats paragraph 16(e) of this pleading; and
 - (ii) says that, in the premises, since the Ansett Collapse, no amount of the Flight Centre Unavailed Moneys can be due to Ansett and Flight Centre cannot be responsible to pay any amount of the Flight Centre Unavailed Moneys to Ansett;
- (i) Further, Flight Centre refers to and repeats paragraph 16(f) of this pleading.
33. Flight Centre denies paragraph 32 and refers to and repeats paragraphs 14, 15(a) and 32 of this pleading.
34. Save that it admits the terms of sub-paragraph 7.3 of the PSAA, Flight Centre denies paragraph 33 and refers to and repeats paragraph 32 of this pleading.
35. As to paragraph 34:
- (a) Flight Centre admits that the terms of IATA resolution 850 were incorporated into the PSAA by sub-paragraph 2.1(b) of the PSAA;
 - (b) Flight Centre admits that on or about 14 September 2001 the Manager, BSP Australia stated in writing to Flight Centre as alleged in sub-paragraph (b) of paragraph 34 of the statement of claim;
 - (c) Flight Centre otherwise denies paragraph 34 and refers to and repeats paragraph 32 of this pleading.
36. Flight Centre denies paragraph 35 and refers to and repeats paragraph 32 of this pleading.
37. As to paragraph 36:
- (a) Flight Centre admits that by the statement of claim Ansett demands that Flight Centre pay to Ansett the First Amount Payable;
 - (b) Flight Centre admits that Ansett has made the demands particularised below that Flight Centre pay to Ansett the First Amount Payable;

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- (1) Letter dated 19 March 2002 to Flight Centre from Andersen Legal, solicitors for Ansett, demanding payment of an unquantified amount in respect of availed travel.
- (2) Letters to Flight Centre dated 8 May 2002 from Andersen Legal; and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett, demanding payment of the First Amount Payable.

(c) Flight Centre otherwise denies paragraph 36.

38. As to paragraph 37:

(a) Flight Centre admits that it has not paid or remitted the First Amount Payable to Ansett and that Ansett is entitled to the Flight Centre Net Availed Moneys;

(b) Flight Centre otherwise denies paragraph 37;

(c) Flight Centre says that, other than the Flight Centre Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the Flight Centre Moneys or the First Amount Payable.

39. As to paragraph 38:

(a) ITG refers to and repeats paragraph 17 of this pleading;

(b) ITG admits that upon the issue by it of such of the Second Traffic Documents as it issued, and prior to the Ansett Collapse, it was responsible for payment, in accordance with the PSAA and any other applicable contractual arrangements between Ansett and ITG, of the ITG Moneys to Ansett;

(c) ITG says that:

(i) prior to the Ansett Collapse, under the terms of the PSAA, no amount of the ITG Moneys had become due to be remitted to Ansett; and

(ii) further or alternatively, if, which is denied, prior to the Ansett Collapse any amount of the ITG Moneys had become due to be remitted to Ansett, upon the Ansett Collapse such amount (other than any amount of the ITG Net Availed Moneys) ceased to be due to be remitted to Ansett, by reason of the matters alleged in the remainder of this paragraph 39;

(d) ITG:

(i) admits that, under the PSAA, since the time of the Ansett Collapse, and subject to paragraphs 99 to 133 (inclusive) of this pleading, to which it refers and which it repeats, the ITG Availed Moneys have become due to be remitted by it to Ansett, less the ITG Deductions and each of them; and

- (ii) therefore admits that the amount of the ITG Net Availed Moneys is due by it to Ansett;
- (e) ITG otherwise denies paragraph 38;
- (f) Further, ITG:
 - (i) refers to and repeats paragraph 19(c) of this pleading; and
 - (ii) says that, in the premises, since the Ansett Collapse, no amount of the ITG Unavailed Moneys can be due to Ansett and ITG cannot be responsible to pay any amount of the ITG Unavailed Moneys to Ansett;
- (g) Further, and in the alternative to paragraph 39(f) of this pleading, ITG:
 - (i) refers to and repeats paragraph 19(d) of this pleading;
 - (ii) says that, accordingly, from the time of the Ansett Collapse:
 - (A) the ITG Payors, at common law and/or under the *Frustrated Contracts Act* 1959 (Vic), became entitled, as against Ansett, to the ITG Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, Ansett, as against the ITG Payors, ceased to be entitled, and has not been entitled, to the ITG Unavailed Moneys or any part thereof; and
 - (iii) says that, in the premises, pursuant to the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, from the time of the Ansett Collapse, ITG has not been and is not required to collect, nor to pay or remit to Ansett, the ITG Unavailed Moneys or any part thereof;
- (h) Further, and in the alternative to paragraphs 39(f) and 39(g) of this pleading, ITG:
 - (i) refers to and repeats paragraph 19(e) of this pleading; and
 - (ii) says that, in the premises, since the Ansett Collapse, no amount of the ITG Unavailed Moneys can be due to Ansett and ITG cannot be responsible to pay any amount of the ITG Unavailed Moneys to Ansett;
- (i) Further, ITG refers to and repeats paragraph 19(f) of this pleading.

40. ITG denies paragraph 39 and refers to and repeats paragraphs 17, 18(a) and 39 of this pleading.
41. Save that it admits the terms of sub-paragraph 7.3 of the PSAA, ITG denies paragraph 40 and refers to and repeats paragraph 39 of this pleading.
42. As to paragraph 41:
- (a) ITG admits that the terms of IATA resolution 850 were incorporated into the PSAA by sub-paragraph 2.1(b) of the PSAA;
 - (b) ITG admits that on or about 14 September 2001 the Manager, BSP Australia stated in writing to ITG as alleged in sub-paragraph (b) of paragraph 41 of the statement of claim;
 - (c) ITG otherwise denies paragraph 41 and refers to and repeats paragraph 39 of this pleading.
43. ITG denies paragraph 42 and refers to and repeats paragraph 39 of this pleading.
44. As to paragraph 43:
- (a) ITG admits that by the statement of claim Ansett demands that ITG pay to Ansett the Second Amount Payable;
 - (b) ITG admits that Ansett has made the demands particularised below that ITG pay to Ansett the Second Amount Payable;

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- (1) Letter dated 19 March 2002 to ITG from Andersen Legal, solicitors for Ansett, demanding payment of an unquantified amount in respect of availed travel.
 - (2) Letters to Flight Centre dated 10 May 2002 from Andersen Legal, and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett, demanding payment of the Second Amount Payable.
- (c) ITG otherwise denies paragraph 43.
45. As to paragraph 44:
- (a) ITG admits that it has not paid or remitted the Second Amount Payable to Ansett and that Ansett is entitled to the ITG Net Availed Moneys;
 - (b) ITG otherwise denies paragraph 44;

- (c) ITG says that, other than the ITG Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the ITG Moneys or the Second Amount Payable.

46. As to paragraph 45:

- (a) FFPL refers to and repeats paragraph 20 of this pleading;
- (b) FFPL admits that upon the issue by it of such of the Third Traffic Documents as it issued, and prior to the Ansett Collapse, it was responsible for payment, in accordance with the PSAA and any other applicable contractual arrangements between Ansett and FFPL, of the FFPL Moneys to Ansett;
- (c) FFPL says that:
 - (i) prior to the Ansett Collapse, under the terms of the PSAA, no amount of the FFPL Moneys had become due to be remitted to Ansett; and
 - (ii) further or alternatively, if, which is denied, prior to the Ansett Collapse any amount of the FFPL Moneys had become due to be remitted to Ansett, upon the Ansett Collapse such amount (other than any amount of the FFPL Net Availed Moneys) ceased to be due to be remitted to Ansett, by reason of the matters alleged in the remainder of this paragraph 46;
- (d) FFPL:
 - (i) admits that, under the PSAA, since the time of the Ansett Collapse, and subject to paragraphs 134 to 165 (inclusive) of this pleading, to which it refers and which it repeats, the FFPL Availed Moneys have become due to be remitted by it to Ansett, less the FFPL Deductions and each of them; and
 - (ii) therefore admits that the amount of the FFPL Net Availed Moneys is due by it to Ansett;
- (e) FFPL otherwise denies paragraph 45;
- (f) Further, FFPL:
 - (i) refers to and repeats paragraph 22(c) of this pleading; and

- (ii) says that, in the premises, since the Ansett Collapse, no amount of the FFPL Unavailed Moneys can be due to Ansett and FFPL cannot be responsible to pay any amount of the FFPL Unavailed Moneys to Ansett;
- (g) Further, and in the alternative to paragraph 46(f) of this pleading, FFPL:
- (i) refers to and repeats paragraph 22(d) of this pleading;
 - (ii) says that, accordingly, from the time of the Ansett Collapse:
 - (A) the FFPL Payors, at common law and/or under the *Frustrated Contracts Act 1959 (Vic)*, became entitled, as against Ansett, to the FFPL Unavailed Moneys; and
 - (B) within the meaning of the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, Ansett, as against the FFPL Payors, ceased to be entitled, and has not been entitled, to the FFPL Unavailed Moneys or any part thereof; and
 - (iii) says that, in the premises, pursuant to the term of the PSAA set out in paragraph 11(b)(iv) of this pleading, from the time of the Ansett Collapse, FFPL has not been and is not required to collect, nor to pay or remit to Ansett, the FFPL Unavailed Moneys or any part thereof;
- (h) Further, and in the alternative to paragraphs 46(f) and 46(g) of this pleading, FFPL:
- (i) refers to and repeats paragraph 22(e) of this pleading; and
 - (ii) says that, in the premises, since the Ansett Collapse, no amount of the FFPL Unavailed Moneys can be due to Ansett and FFPL cannot be responsible to pay any amount of the FFPL Unavailed Moneys to Ansett;
- (i) Further, FFPL refers to and repeats paragraph 22(f) of this pleading.
47. FFPL denies paragraph 46 and refers to and repeats paragraphs 20, 21(a) and 46 of this pleading.
48. Save that it admits the terms of sub-paragraph 7.3 of the PSAA, FFPL denies paragraph 47 and refers to and repeats paragraph 46 of this pleading.

49. As to paragraph 48:
- (a) FFPL admits that the terms of IATA resolution 850 were incorporated into the PSAA by sub-paragraph 2.1(b) of the PSAA;
 - (b) FFPL admits that on or about 14 September 2001 the Manager, BSP Australia stated in writing to FFPL as alleged in sub-paragraph (b) of paragraph 48 of the statement of claim;
 - (c) FFPL otherwise denies paragraph 48 and refers to and repeats paragraph 46 of this pleading.
50. FFPL denies paragraph 49 and refers to and repeats paragraph 46 of this pleading.
51. As to paragraph 50:
- (a) FFPL admits that by the statement of claim Ansett demands that FFPL pay to Ansett the Third Amount Payable;
 - (b) FFPL otherwise denies paragraph 50.
52. As to paragraph 51:
- (a) FFPL admits that it has not paid or remitted the Third Amount Payable to Ansett and that Ansett is entitled to the FFPL Net Availed Moneys;
 - (b) FFPL otherwise denies paragraph 51;
 - (c) FFPL says that, other than the FFPL Net Availed Moneys, it is not and since the Ansett Collapse never has been obliged to pay to Ansett any amount in respect of the FFPL Moneys or the Third Amount Payable.
53. Save that the defendants admit that, respectively, they are obliged to pay to Ansett the Flight Centre Net Availed Moneys, the ITG Net Availed Moneys and the FFPL Net Availed Moneys (if any), the defendants deny paragraph 52.
54. Further, by an agreement between Air New Zealand Limited, Ansett and Flight Centre (the **First Commercial Agreement**), Ansett and Flight Centre agreed on the commercial terms under which Flight Centre would promote and market Ansett's products and services for the period from 1 January 2001 to 30 June 2001.

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- (1) The First Commercial Agreement was in writing, or alternatively was partly in writing and partly by conduct.

- (2) The written portion of the First Commercial Agreement comprised the undated agreement entitled "Commercial Agreement" and executed on behalf of Flight Centre by Ms Sharon Poulos in her capacity as National Contract Manager for Flight Centre.
 - (3) Any portion by conduct was the acts of Ansett in making payments to Flight Centre in accordance with the terms of the undated agreement entitled "Commercial Agreement" and executed on behalf of Flight Centre by Ms Sharon Poulos in her capacity as National Contract Manager for Flight Centre.
55. It was an express term of the First Commercial Agreement, amongst others, that:
- (a) the First Commercial Agreement had effect for the period from 1 January 2001 to 30 June 2001;
 - (b) Ansett would pay Base Commission to Flight Centre at the rates notified by Ansett from time to time;
 - (c) Base Commission was the amount of commission, represented as a percentage of the gross value of Ansett Domestic Ticketed Revenue, that Flight Centre may deduct pursuant to clause 4 of the First Commercial Agreement prior to remitting the Ansett Domestic Ticketed Revenue to Ansett;
 - (d) in accordance with schedule 5 of the First Commercial Agreement, Ansett agreed to pay to Flight Centre override commission with respect to sales of Ansett international services;
 - (e) all amounts payable by Ansett to Flight Centre in relation to the First Commercial Agreement (including commissions) were exclusive of GST. If GST was payable by Ansett on a Taxable Supply made by it under the First Commercial Agreement, the amount payable for the Taxable Supply was the amount expressed in the First Commercial Agreement plus GST.
56. For the purpose of the PSAA and for the purpose of the term referred to in paragraph 55(b) of this pleading, the rate of Base Commission notified by Ansett to Flight Centre from time to time was 5% with respect to domestic travel and 9% with respect to international travel.
57. By reason of the sale of transportation and other ancillary services of Ansett by Flight Centre, Ansett was liable to pay to Flight Centre override commission of \$24,975.60 pursuant to the PSAA and the First Commercial Agreement.

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- (1) Override commission on international services for May 2001 of \$10,700.71.
 - (2) Override commission on international services for June 2001 of \$14,274.89.
58. As at the date hereof Ansett has not paid to Flight Centre the amount of \$24,975.60 or any part thereof.
59. In the premises, as at 14 September 2001, Ansett was obliged by the terms of the PSAA and the First Commercial Agreement to pay to Flight Centre the amount of \$24,975.60.
60. By a further agreement between Air New Zealand Limited, Ansett and Flight Centre (the **Second Commercial Agreement**), Ansett and Flight Centre agreed on the commercial terms under which Flight Centre would promote and market Ansett's products and services for the period from 1 July 2001.

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- (1) The Second Commercial Agreement was partly in writing and partly by conduct.
 - (2) The written portion of the Second Commercial Agreement comprised a written schedule (the **Schedule**) of override commissions payable by Ansett to Flight Centre, and the First Commercial Agreement.
 - (3) The portion by conduct was the acts of Ansett in making payments to Flight Centre in accordance with the Schedule and the terms of the First Commercial Agreement.
61. It was an express term of the Second Commercial Agreement, amongst others, that:
- (a) Ansett would pay to Flight Centre the override commissions and incentive commissions calculated in accordance with Schedule;
 - (b) Ansett would provide a domestic ticket fund or allowance to the value of \$300,000 being airline travel within Australia on Ansett services for use by Flight Centre during the period from 1 July 2001 to 30 June 2002.
62. It was an implied term of the Second Commercial Agreement that the terms of the First Commercial Agreement would continue to have application and were to be incorporated into the Second Commercial Agreement except to the extent that they were inconsistent (whether expressly or impliedly) with the terms of the Schedule.

63. By reason of the sale of transportation and other ancillary services of Ansett by Flight Centre, Ansett was liable to pay to Flight Centre pursuant to the PSAA and the Second Commercial Agreement:

- (a) Base Commission (inclusive of GST) of at least \$283,629.89;
- (b) override commission in the sum of \$1,078,647.34 for Ansett domestic services;

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- (1) Override commission for July 2001 of \$417,126.15
 - (2) Override commission for August 2001 of \$366,231.04
 - (3) Override commission for September 2001 of \$295,290.15
- (c) override commission in the sum of \$43,506.22 for Ansett international services;

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- (1) Override commission for July 2001 of \$18,335.89
 - (2) Override commission for August 2001 of \$12,441.89
 - (3) Override commission for September 2001 of \$12,728.44
- (d) incentive commission of \$83,098.53 for Ansett domestic services;

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- (1) Incentive commission for July 2001 of \$46,347.35
 - (2) Incentive commission for August 2001 of 20,346.17
 - (3) Incentive commission for September 2001 of \$16,405.01
64. As at the date hereof Ansett has not paid to Flight Centre the amounts of \$283,629.89, \$1,078,647.34, \$43,506.22 and \$83,098.53 or any part thereof.
65. In the premises, as at 14 September 2001, Ansett was obliged by the terms of the PSAA and the Second Commercial Agreement to pay to Flight Centre the amount of \$1,488,881.98.
66. In the event that Ansett had continued to provide transportation and other ancillary services after 14 September 2001, Flight Centre would have become entitled to the benefit of:
- (a) additional override commission in the sum of \$270,437.71,

PARTICULARS

- (1) Override commission on Ansett domestic services of \$233,516.99.
 - (2) Override commission on Ansett international services of \$36,920.72.
- (b) a domestic ticket travel fund or allowance in the sum of \$300,000 in accordance with the term set out in paragraph 61(b) of this pleading.
67. Within the meaning of the term of the PSAA set out in paragraph 11(b)(ii) of this pleading, the sums of \$270,437.71 and \$300,000 represents a loss, injury or damage, whether direct, indirect or consequential, incurred by Flight Centre arising from the failure of Ansett to provide the transportation or other ancillary services referred to therein.
68. In the premises, as at 14 September 2001, Ansett was obliged by the terms of the PSAA to pay to Flight Centre the amounts of \$270,437.71 and \$300,000.
69. As at the date hereof Ansett has not paid to Flight Centre the amounts of \$270,437.71 and \$300,000 or any part thereof.
70. In the premises, Ansett is indebted to Flight Centre in the amounts of:
- (a) \$283,629.89 in accordance with paragraph 63(a) of this pleading (the **Flight Centre Base Commission**);
 - (b) \$1,417,566.87 in accordance with paragraphs 59, 63(b), 63(c) and 66(a) of this pleading (the **Flight Centre Override Commission**);
 - (c) \$300,000 in accordance with paragraph 66(b) of this pleading (the **Domestic Ticket Fund**),
- and those amounts, which Flight Centre hereby demands from Ansett, are due and payable by Ansett to Flight Centre.
71. Further, in accordance with the meaning of the term set out in paragraph 11(b)(iii) of this pleading, each of the Flight Centre Base Commission and the Flight Centre Override Commission (the **Flight Centre Commissions**) were:
- (a) part of the commission of Flight Centre for the sale of air transportation and ancillary services stated from time to time and communicated to Flight Centre by Ansett as provided for in paragraph 9 of the PSAA;
 - (b) an amount that, pursuant to sub-paragraph 7.2 of the PSAA, as at 14 September 2001 Flight Centre was entitled to deduct from remittances to Ansett under the PSAA.

72. By letters dated 8 May 2002 and 13 September 2002 (each a **Purported Instruction** and together the **Purported Instructions** for the purpose of paragraphs 72 to 78 (inclusive) of this pleading and Flight Centre's counterclaim), Ansett purported to instruct Flight Centre that it was not entitled to deduct any commission from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.

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Letters to Flight Centre dated 8 May 2002 from Andersen Legal, and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett.

73. On the terms of the Purported Instructions, as set out in paragraph 72 of this pleading, the Purported Instructions and each of them purported to instruct Flight Centre that it was not entitled to deduct the Flight Centre Commissions or any of them, from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.
74. At the time of the Purported Instructions and each of them:
- (a) Flight Centre's entitlement to the Flight Centre Commissions and each of them had already arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (b) Flight Centre had collected the moneys to which its entitlement to the Flight Centre Commissions and each of them related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (c) more than a reasonable time had passed since Flight Centre's entitlement to the Flight Centre Commissions and each of them had arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading; and
 - (d) more than a reasonable time had passed since Flight Centre had collected the moneys to which its entitlement to the Flight Centre Commissions and each of them, related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading.
75. Further, Ansett's giving of the Purported Instructions and each of them:
- (a) constituted acting other than in good faith in giving an instruction to Flight Centre that it was not entitled to deduct the Flight Centre Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, within the meaning of the term of the PSAA set out in paragraph 11(b)(viii) of this pleading; and

- (b) constituted instructing Flight Centre that it was not entitled to deduct the Flight Centre Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, with the purpose of preventing Flight Centre from obtaining those commissions or otherwise defeating Flight Centre's entitlement to those commissions, within the meaning of the term of the PSAA set out in paragraph 11(b)(ix) of this pleading.

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The absence of good faith alleged, and the purpose alleged, are to be implied from the following:

- (1) the fact that Ansett was in administration or under a deed of company arrangement, as the case may have been;
 - (2) the fact that Ansett would be unable to meet claims of unsecured creditors;
 - (3) the passage of time between the Ansett Collapse and the Purported Instructions;
 - (4) the fact that withdrawal of the entitlement to deduct the Flight Centre Base Commission and the Flight Centre Override Commission and both of them, would or might prejudice Flight Centre's recovery of those amounts and each of them from Ansett; and
 - (5) the fact that Ansett was aware of each of the matters in (1)-(4) above.
76. By reason of the matters alleged in paragraphs 74 and/or 75 of this pleading, the Purported Instructions were and each of them was contrary to the terms of the PSAA set out in paragraphs 11(b)(vii), 11(b)(viii) and 11(b)(ix) of this pleading and each of them.
77. In the premises, Ansett was not entitled to instruct Flight Centre as it purported to do by the Purported Instructions, and the Purported Instructions were, and each of them was, of no effect.
78. Further or alternatively, the Purported Instructions, and each of them, had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the respective dates of the Purported Instructions.
79. Accordingly, Flight Centre is, and at all times since the Ansett Collapse has been, entitled to deduct from remittances to Ansett under the PSAA the Flight Centre Commissions and each of them.

80. Further, as a consequence of the Ansett Collapse, Flight Centre incurred chargebacks (the ***Flight Centre Merchant Amount***) with respect to Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett during the period prior to 27 August 2001, for the reason that they had not been availed prior to the Ansett Collapse.

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Flight Centre incurred chargebacks in the amount of \$437,608.93.

81. Within the meaning of the term of the PSAA set out in paragraph 11(b)(ii) of this pleading, the Flight Centre Merchant Amount represents a loss, injury or damage, whether direct, indirect or consequential, incurred by Flight Centre arising from the failure of Ansett to provide the transportation or other ancillary services referred to therein.
82. As at the date hereof, Ansett has not paid to Flight Centre the amount of the Flight Centre Merchant Amount or any part thereof.
83. In the premises, as at 14 September 2001, Ansett was obliged by the terms of the PSAA to pay to Flight Centre the amount of the Flight Centre Merchant Amount and that amount, which Flight Centre hereby demands from Ansett, is due and payable by Ansett to Flight Centre.
84. Further, as at the Ansett Collapse, Flight Centre was entitled to, but had not received, refunds due from Ansett and adjustments included in agency credit memos issued by Flight Centre to Ansett (the aggregate of the adjustments is referred to herein as the ***Flight Centre ACMs***).

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The Flight Centre ACMs totalled \$220,302.98.

85. As at the date hereof, Ansett has not paid to Flight Centre the amount of the Flight Centre ACMs or any part thereof.
86. In the premises, as at 14 September 2001, Ansett was obliged to pay to Flight Centre the amount of the Flight Centre ACMs and that amount, which Flight Centre hereby demands from Ansett, is due and payable by Ansett to Flight Centre.
87. When remitting the Flight Centre Availed Moneys to Ansett Flight Centre is entitled to and will deduct each of the Flight Centre Deductions from, and set off each of the Flight Centre Deductions against, the Flight Centre Availed Moneys, and hereby does so.

88. Further or alternatively, Flight Centre's claims against Ansett for the Flight Centre Deductions and each of them, and Ansett's claims against Flight Centre in this proceeding, all arise from dealings between them under the PSAA and related agreements, namely the First Commercial Agreement and the Second Commercial Agreement, in respect of the issuance of Traffic Documents and/or the drawing of Transportation Orders by Flight Centre on behalf of and as agent for Ansett.
89. As a result, Flight Centre's claims against Ansett for the Flight Centre Deductions:
- (a) are inseparably connected with and bound with Ansett's claims against Flight Centre in this proceeding;
 - (b) further or alternatively, go to the root of and impeach the title of Ansett's claims against Flight Centre in this proceeding.
90. In the premises, Flight Centre was and remains entitled, by an equitable set off, to set off, and does hereby set off, its claims against Ansett for the Flight Centre Deductions, and each of them, against:
- (a) its liability to pay to Ansett the Flight Centre Aailed Moneys; and
 - (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.
91. Further or alternatively, section 553C of the *Corporations Act* is applicable to the claims of Ansett against Flight Centre and Flight Centre against Ansett.

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Clause 14 of the deed of company arrangement dated 2 May 2002 to which Ansett is subject provides that the rules and mechanisms to be applied to proofs of debt and the ascertainment of Claims (as defined therein) shall be similar to the rules and mechanisms for such things prescribed by the *Corporations Act* in the context of the liquidation of a company, amended or adjusted as appropriate to make the process as cost effective as possible, and section 553C of the *Corporations Act* is such a rule or mechanism.

Further or alternatively, pursuant to section 444A(5) of the *Corporations Act* 2001 read with regulation 5.3A.06 of the *Corporations Regulations* 2001 and clause 8 of Schedule 8A to the *Corporations Regulations*, section 553C of the *Corporations Act* was and is taken to be included in the deed of company arrangement unless the deed otherwise provided, and it did not do so.

92. Within the meaning of section 553C of the *Corporations Act* 2001:
- (a) on the one hand, Ansett's liability to Flight Centre for the Flight Centre Deductions, and each of them; and

- (b) on the other hand, Flight Centre's liability to Ansett for the Flight Centre Availed Moneys and (if, which is denied, Flight Centre has any other liability or liabilities to Ansett in this proceeding), such other liability or liabilities, are mutual credits and mutual debts, or further or alternatively are or arise from mutual dealings.
93. In the premises, by operation of section 553C of the *Corporations Act* 2001, Ansett's liability to Flight Centre for the Flight Centre Deductions and each of them has been set off, further or alternatively is hereby set off:
- (a) against Flight Centre's liability to Ansett for the Flight Centre Availed Moneys; and
- (b) if, which is denied, Flight Centre has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
94. Further or alternatively, Flight Centre will and hereby does, to the extent that it is able under Rule 13.14 of Chapter I of the Supreme Court Rules, set off the Flight Centre Deductions, and each of them:
- (a) against Flight Centre's liability to Ansett for the Flight Centre Availed Moneys; and
- (b) if, which is denied, Flight Centre has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
95. Further or alternatively:
- (a) it was a consequence of the relationship of principal and agent between Ansett and Flight Centre that Flight Centre was and is entitled by operation of law to a lien as Ansett's agent, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as agent; and
- (b) further or alternatively, it was a consequence of the relationship of trustee and beneficiary between Flight Centre and Ansett that Flight Centre was and is entitled by operation of law to a lien as a trustee for Ansett, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as trustee;

- (c) pursuant to the lien asserted in paragraph 95(a) above or, alternatively, pursuant to the lien asserted in paragraph 95(b) above, Flight Centre was and is entitled to apply moneys owing by Ansett to it against moneys of Ansett in its hands, in satisfaction of the moneys owing by Ansett to it.
96. In the premises, Flight Centre holds a lien over the Flight Centre Aailed Moneys (and if, which is denied, it holds any other moneys of Ansett, over such moneys), to the extent of the Flight Centre Deductions and each of them, and is entitled to, and hereby does, apply the Flight Centre Deductions against such moneys in satisfaction of the Flight Centre Deductions owing by Ansett to it.
97. Further or alternatively, it was a consequence of the relationship of principal and agent between Ansett and Flight Centre:
- (a) that Flight Centre, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it;
- (b) that, further or alternatively, it was a term of the agreements between Flight Centre and Ansett implied by operation of law that Flight Centre, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it.
98. Pursuant to the entitlement alleged in paragraph 97(a) above, or further or alternatively the entitlement alleged in paragraph 97(b) above, Flight Centre hereby sets off its claims against Ansett for the Flight Centre Deductions and each of them against, and deducts those claims from:
- (a) its liability to pay to Ansett the Flight Centre Aailed Moneys; and
- (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.
99. Further, for the purpose of the PSAA, the rate of base commission notified by Ansett to ITG from time to time was 5% with respect to domestic travel and 9% with respect to international travel.
100. By reason of the sale of transportation and other ancillary services of Ansett by ITG, Ansett was liable to pay to ITG pursuant to the PSAA:
- (a) base commission (inclusive of GST) of at least \$57,846.00;
- (b) override commission in the sum of \$162,300.00.

101. As at the date hereof Ansett has not paid to ITG the amounts of \$57,846.00 and \$162,300 or any part thereof.
102. In the premises, Ansett is indebted to ITG in the amounts of:
- (a) \$57,846.00 in accordance with paragraph 100(a) of this pleading (the *ITG Base Commission*);
 - (b) \$162,300 in accordance with paragraph 100(b) of this pleading (the *ITG Override Commission*),
- and those amounts, which ITG hereby demands from Ansett, are due and payable by Ansett to ITG.
103. Further, as at the time of the Ansett Collapse ITG and Ansett were party to a number of agreements entitled "Subvention Agreement" (the *ITG Subvention Agreements*).
104. It was an express term of each of the ITG Subvention Agreements, amongst others, that:
- (a) Ansett would pay to ITG the Subvention Commission for all Ansett Ticketed Revenue generated by sales to each Eligible Account by ITG, provided that the Minimum Percentage for that Eligible Account was achieved;
 - (b) an amount equal to or greater than the Subvention Commission paid by Ansett in accordance with the Subvention Agreement was to be paid by ITG to the Eligible Account as a rebate on the travel purchased on Ansett domestic air passenger services to which the Subvention Commission paid related.
105. The Eligible Accounts to which the ITG Subvention Agreements related were:
- (a) Boral;
 - (b) Origin; and
 - (c) Allens.
106. In respect of air travel with Ansett by those Eligible Accounts that was booked through ITG and to which the Subvention Agreement rebate applied, the rebate would be effected as follows:
- (a) in respect of each relevant ticket, ITG was obliged to charge the customer only the cost of the ticket less the amount of the applicable rebate (calculated by applying the applicable rebate percentage to the cost of the ticket);

- (b) ITG was obliged to remit to Ansett the full cost of the ticket, in the course of making its regular remittances to Ansett via the BSP; and
 - (c) subsequently, Ansett was obliged to remit to ITG the amount of the rebate for the ticket.
107. As at the time of the Ansett Collapse, there was an amount of \$263,000 (the **ITG Subvention Amount**) that Ansett was obliged to pay and had not paid to ITG pursuant to the Subvention Agreements in respect of tickets that ITG had issued at full cost less applicable rebate to customers to whom the ITG Subvention Agreements applied and the full cost of which ITG had then remitted to Ansett via the BSP.
108. As at the date hereof Ansett has not paid to ITG the ITG Subvention Amount or any part thereof.
109. In the premises, Ansett is indebted to ITG in the amount of the ITG Subvention Amount, and that amount, which ITG hereby demands from Ansett, is due and payable by Ansett to ITG.
110. Further, in accordance with the meaning of the term set out in paragraph 11(b)(iii) of this pleading, each of the ITG Base Commission, the ITG Override Commission and the ITG Subvention Amount (the **ITG Commissions**) were:
- (a) part of the commission of ITG for the sale of air transportation and ancillary services stated from time to time and communicated to ITG by Ansett as provided for in paragraph 9 of the PSAA;
 - (b) an amount that, pursuant to sub-paragraph 7.2 of the PSAA, as at 14 September 2001 ITG was entitled to deduct from remittances to Ansett under the PSAA.
111. By letters dated 10 May 2002 and 13 September 2002 (each a **Purported Instruction** and together the **Purported Instructions** for the purpose of paragraphs 111 to 117 (inclusive) of this pleading and ITG's counterclaim), Ansett purported to instruct ITG that it was not entitled to deduct any commission from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.

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Letters to ITG dated 10 May 2002 from Andersen Legal, and 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett.

112. On the terms of the Purported Instructions, as set out in paragraph 111 of this pleading, the Purported Instructions and each of them purported to instruct ITG that it was not entitled to deduct the ITG Commissions or any of them, from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.
113. At the time of the Purported Instructions and each of them:
- (a) ITG's entitlement to the ITG Commissions and each of them had already arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (b) ITG had collected the moneys to which its entitlement to the ITG Commissions and each of them related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (c) more than a reasonable time had passed since ITG's entitlement to the ITG Commissions and each of them had arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading; and
 - (d) more than a reasonable time had passed since ITG had collected the moneys to which its entitlement to the ITG Commissions and each of them, related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading.
114. Further, Ansett's giving of the Purported Instructions and each of them:
- (a) constituted acting other than in good faith in giving an instruction to ITG that it was not entitled to deduct the ITG Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, within the meaning of the term of the PSAA set out in paragraph 11(b)(viii) of this pleading; and
 - (b) constituted instructing ITG that it was not entitled to deduct the ITG Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, with the purpose of preventing ITG from obtaining those commissions or otherwise defeating ITG's entitlement to those commissions, within the meaning of the term of the PSAA set out in paragraph 11(b)(ix) of this pleading.

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The absence of good faith alleged, and the purpose alleged, are to be implied from the following:

- (1) the fact that Ansett was in administration or under a deed of company arrangement, as the case may have been;
 - (2) the fact that Ansett would be unable to meet claims of unsecured creditors;
 - (3) the passage of time between the Ansett Collapse and the Purported Instructions;
 - (4) the fact that withdrawal of the entitlement to deduct the ITG Base Commission, the ITG Override Commission, the ITG Subvention Amount, and each of them, would or might prejudice ITG's recovery of those amounts and each of them from Ansett; and
 - (5) the fact that Ansett was aware of each of the matters in (1)-(4) above.
115. By reason of the matters alleged in paragraphs 113 and/or 114 of this pleading, the Purported Instructions were and each of them was contrary to the terms of the PSAA set out in paragraphs 11(b)(vii), 11(b)(viii) and 11(b)(ix) of this pleading and each of them.
116. In the premises, Ansett was not entitled to instruct ITG as it purported to do by the Purported Instructions, and the Purported Instructions were, and each of them was, of no effect.
117. Further or alternatively, the Purported Instructions, and each of them, had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the respective dates of the Purported Instructions.
118. Accordingly, ITG is, and at all times since the Ansett Collapse has been, entitled to deduct from remittances to Ansett under the PSAA the ITG Commissions and each of them.
119. Further, as at the Ansett Collapse, ITG was entitled to, but had not received, adjustments included in agency credit memos issued by ITG to Ansett (the aggregate of the adjustments is referred to herein as the **ITG ACMs**).

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The ITG ACMs totalled \$345,319.

120. As at the date hereof, Ansett has not paid to ITG the amount of the ITG ACMs or any part thereof.
121. In the premises, as at 14 September 2001, Ansett was obliged to pay to ITG the amount of the ITG ACMs and that amount, which ITG hereby demands from Ansett, is due and payable by Ansett to ITG.

122. When remitting the ITG Aailed Moneys to Ansett ITG is entitled to and will deduct each of the ITG Deductions from, and set off each of the ITG Deductions against, the ITG Aailed Moneys, and hereby does so.
123. Further or alternatively, ITG's claims against Ansett for the ITG Deductions and each of them, and Ansett's claims against ITG in this proceeding, all arise from dealings between them under the PSAA and related agreements, in respect of the issuance of Traffic Documents and/or the drawing of Transportation Orders by ITG on behalf of and as agent for Ansett.
124. As a result, ITG's claims against Ansett for the ITG Deductions:
- (a) are inseparably connected with and bound with Ansett's claims against ITG in this proceeding;
 - (b) further or alternatively, go to the root of and impeach the title of Ansett's claims against ITG in this proceeding.
125. In the premises, ITG was and remains entitled, by an equitable set off, to set off, and does hereby set off, its claims against Ansett for the ITG Deductions, and each of them, against:
- (a) its liability to pay to Ansett the ITG Aailed Moneys; and
 - (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.
126. Further or alternatively, section 553C of the *Corporations Act* is applicable to the claims of Ansett against ITG and ITG against Ansett.

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Clause 14 of the deed of company arrangement dated 2 May 2002 to which Ansett is subject provides that the rules and mechanisms to be applied to proofs of debt and the ascertainment of Claims (as defined therein) shall be similar to the rules and mechanisms for such things prescribed by the *Corporations Act* in the context of the liquidation of a company, amended or adjusted as appropriate to make the process as cost effective as possible, and section 553C of the *Corporations Act* is such a rule or mechanism.

Further or alternatively, pursuant to section 444A(5) of the *Corporations Act* 2001 read with regulation 5.3A.06 of the *Corporations Regulations* 2001 and clause 8 of Schedule 8A to the *Corporations Regulations*, section 553C of the *Corporations Act* was and is taken to be included in the deed of company arrangement unless the deed otherwise provided, and it did not do so.

127. Within the meaning of section 553C of the *Corporations Act* 2001:

- (a) on the one hand, Ansett's liability to ITG for the ITG Deductions, and each of them; and
- (b) on the other hand, ITG's liability to Ansett for the ITG Availed Moneys and (if, which is denied, ITG has any other liability or liabilities to Ansett in this proceeding), such other liability or liabilities,

are mutual credits and mutual debts, or further or alternatively are or arise from mutual dealings.

128. In the premises, by operation of section 553C of the *Corporations Act 2001*, Ansett's liability to ITG for the ITG Deductions and each of them has been set off, further or alternatively is hereby set off:
- (a) against ITG's liability to Ansett for the ITG Availed Moneys; and
 - (b) if, which is denied, ITG has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
129. Further or alternatively, ITG will and hereby does, to the extent that it is able under Rule 13.14 of Chapter I of the Supreme Court Rules, set off the ITG Deductions, and each of them:
- (a) against ITG's liability to Ansett for the ITG Availed Moneys; and
 - (b) if, which is denied, ITG has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
130. Further or alternatively:
- (a) it was a consequence of the relationship of principal and agent between Ansett and ITG that ITG was and is entitled by operation of law to a lien as Ansett's agent, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as agent; and
 - (b) further or alternatively, it was a consequence of the relationship of trustee and beneficiary between ITG and Ansett that ITG was and is entitled by operation of law to a lien as a trustee for Ansett, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as trustee;

- (c) pursuant to the lien asserted in paragraph 130(a) above or, alternatively, pursuant to the lien asserted in paragraph 130(b) above, ITG was and is entitled to apply moneys owing by Ansett to it against moneys of Ansett in its hands, in satisfaction of the moneys owing by Ansett to it.
131. In the premises, ITG holds a lien over the ITG Aailed Moneys (and if, which is denied, it holds any other moneys of Ansett, over such moneys), to the extent of the ITG Deductions and each of them, and is entitled to, and hereby does, apply the ITG Deductions against such moneys in satisfaction of the ITG Deductions owing by Ansett to it.
132. Further or alternatively, it was a consequence of the relationship of principal and agent between Ansett and ITG:
- (a) that ITG, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it;
- (b) that, further or alternatively, it was a term of the agreements between ITG and Ansett implied by operation of law that ITG, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it.
133. Pursuant to the entitlement alleged in paragraph 132(a) above, or further or alternatively the entitlement alleged in paragraph 132(b) above, ITG hereby sets off its claims against Ansett for the ITG Deductions and each of them against, and deducts those claims from:
- (a) its liability to pay to Ansett the ITG Aailed Moneys; and
- (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.
134. Further, for the purpose of the PSAA, the rate of base commission notified by Ansett to FFPL from time to time was 5% with respect to domestic travel and 9% with respect to international travel.
135. By reason of the sale of transportation and other ancillary services of Ansett by FFPL, Ansett was liable to pay to FFPL pursuant to the PSAA:
- (a) base commission (inclusive of GST) of \$9,934.32;
- (b) override commission in the sum of \$50,630.58.

136. As at the date hereof Ansett has not paid to FFPL the amounts of \$9,934.32 and \$50,630.58 or any part thereof.
137. In the premises, Ansett is indebted to FFPL in the amounts of:
- (a) \$9,934.32 in accordance with paragraph 135(a) of this pleading (the **FFPL Base Commission**);
 - (b) \$50,630.58 in accordance with paragraph 135(b) of this pleading (the **FFPL Override Commission**),
- and those amounts, which FFPL hereby demands from Ansett, are due and payable by Ansett to FFPL.
138. Further, as at the time of the Ansett Collapse FFPL and Ansett were party to a number of agreements entitled "Subvention Agreement" (the **FFPL Subvention Agreements**).
139. It was an express term of each of the FFPL Subvention Agreements, amongst others, that:
- (a) Ansett would pay to FFPL the Subvention Commission for all Ansett Ticketed Revenue generated by sales to each Eligible Account by FFPL, provided that the Minimum Percentage for that Eligible Account was achieved;
 - (b) an amount equal to or greater than the Subvention Commission paid by Ansett in accordance with the Subvention Agreement was to be paid by FFPL to the Eligible Account as a rebate on the travel purchased on Ansett domestic air passenger services to which the Subvention Commission paid related.
140. The Eligible Accounts to which the FFPL Subvention Agreements related were:
- (a) Baxter Healthcare;
 - (b) Gillette;
 - (c) Austar;
 - (d) SMO; and
 - (e) Getronics.
141. In respect of air travel with Ansett by those Eligible Accounts that was booked through FFPL and to which the Subvention Agreement rebate applied, the rebate would be effected as follows:

- (a) in respect of each relevant ticket, FFPL was obliged to charge the customer only the cost of the ticket less the amount of the applicable rebate (calculated by applying the applicable rebate percentage to the cost of the ticket);
 - (b) FFPL was obliged to remit to Ansett the full cost of the ticket, in the course of making its regular remittances to Ansett via the BSP; and
 - (c) subsequently, Ansett was obliged to remit to FFPL the amount of the rebate for the ticket.
142. As at the time of the Ansett Collapse, there was an amount of \$42,208.50 (the **FFPL Subvention Amount**) that Ansett was obliged to pay and had not paid to FFPL pursuant to the Subvention Agreements in respect of tickets that FFPL had issued at full cost less applicable rebate to customers to whom the FFPL Subvention Agreements applied and the full cost of which FFPL had then remitted to Ansett via the BSP.
143. As at the date hereof Ansett has not paid to FFPL the FFPL Subvention Amount or any part thereof.
144. In the premises, Ansett is indebted to FFPL in the amount of the FFPL Subvention Amount, and that amount, which FFPL hereby demands from Ansett, is due and payable by Ansett to FFPL.
145. Further, in accordance with the meaning of the term set out in paragraph 11(b)(iii) of this pleading, each of the FFPL Base Commission, the FFPL Override Commission and the FFPL Subvention Amount (the **FFPL Commissions**) were:
- (a) part of the commission of FFPL for the sale of air transportation and ancillary services stated from time to time and communicated to FFPL by Ansett as provided for in paragraph 9 of the PSAA;
 - (b) an amount that, pursuant to sub-paragraph 7.2 of the PSAA, as at 14 September 2001 FFPL was entitled to deduct from remittances to Ansett under the PSAA.
146. By a letter 13 September 2002 (the **Purported Instruction** for the purpose of paragraphs 146 to 152 (inclusive) of this pleading and FFPL's counterclaim), Ansett purported to instruct a business operated by FFPL and trading as Campus Travel that it was not entitled to deduct any commission from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.

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Letters to Campus Travel dated 13 September 2002 from Arnold Bloch Leibler, solicitors for Ansett.

147. On the terms of the Purported Instruction, as set out in paragraph 146 of this pleading, the Purported Instruction purported to instruct FFPL that it was not entitled to deduct the FFPL Commissions or any of them, from remittances to Ansett, pursuant to sub-paragraph 7.2 of the PSAA.
148. At the time of the Purported Instruction:
- (a) FFPL's entitlement to the FFPL Commissions and each of them had already arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (b) FFPL had collected the moneys to which its entitlement to the FFPL Commissions and each of them related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading;
 - (c) more than a reasonable time had passed since FFPL's entitlement to the FFPL Commissions and each of them had arisen, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading; and
 - (d) more than a reasonable time had passed since FFPL had collected the moneys to which its entitlement to the FFPL Commissions and each of them, related, within the meaning of the term of the PSAA set out in paragraph 11(b)(vii) of this pleading.
149. Further, Ansett's giving of the Purported Instruction:
- (a) constituted acting other than in good faith in giving an instruction to FFPL that it was not entitled to deduct the FFPL Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, within the meaning of the term of the PSAA set out in paragraph 11(b)(viii) of this pleading; and
 - (b) constituted instructing FFPL that it was not entitled to deduct the FFPL Commissions or any of them pursuant to sub-paragraph 7.2 of the PSAA, with the purpose of preventing FFPL from obtaining those commissions or otherwise defeating FFPL's entitlement to those commissions, within the meaning of the term of the PSAA set out in paragraph 11(b)(ix) of this pleading.

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The absence of good faith alleged, and the purpose alleged, are to be implied from the following:

- (1) the fact that Ansett was in administration or under a deed of company arrangement, as the case may have been;
 - (2) the fact that Ansett would be unable to meet claims of unsecured creditors;
 - (3) the passage of time between the Ansett Collapse and the Purported Instruction;
 - (4) the fact that withdrawal of the entitlement to deduct the FFPL Base Commission, the FFPL Override Commission, the FFPL Subvention Amount, and each of them, would or might prejudice FFPL's recovery of those amounts and each of them from Ansett; and
 - (5) the fact that Ansett was aware of each of the matters in (1)-(4) above.
150. By reason of the matters alleged in paragraphs 148 and/or 149 of this pleading, the Purported Instruction was contrary to the terms of the PSAA set out in paragraphs 11(b)(vii), 11(b)(viii) and 11(b)(ix) of this pleading and each of them.
151. In the premises, Ansett was not entitled to instruct FFPL as it purported to do by the Purported Instruction and the Purported Instruction was of no effect.
152. Further or alternatively, the Purported Instruction had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the date of the Purported Instruction.
153. Accordingly, FFPL is, and at all times since the Ansett Collapse has been, entitled to deduct from remittances to Ansett under the PSAA the FFPL Commissions and each of them.
154. When remitting the FFPL Aailed Moneys to Ansett FFPL is entitled to and will deduct each of the FFPL Deductions from, and set off each of the FFPL Deductions against, the FFPL Aailed Moneys, and hereby does so.
155. Further or alternatively, FFPL's claims against Ansett for the FFPL Deductions and each of them, and Ansett's claims against FFPL in this proceeding, all arise from dealings between them under the PSAA and related agreements, in respect of the issuance of Traffic Documents and/or the drawing of Transportation Orders by FFPL on behalf of and as agent for Ansett.
156. As a result, FFPL's claims against Ansett for the FFPL Deductions:

- (a) are inseparably connected with and bound with Ansett's claims against FFPL in this proceeding;
 - (b) further or alternatively, go to the root of and impeach the title of Ansett's claims against FFPL in this proceeding.
157. In the premises, FFPL was and remains entitled, by an equitable set off, to set off, and does hereby set off, its claims against Ansett for the FFPL Deductions, and each of them, against:
- (a) its liability to pay to Ansett the FFPL Availed Moneys; and
 - (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.
158. Further or alternatively, section 553C of the *Corporations Act* is applicable to the claims of Ansett against FFPL and FFPL against Ansett.

PARTICULARS

Clause 14 of the deed of company arrangement dated 2 May 2002 to which Ansett is subject provides that the rules and mechanisms to be applied to proofs of debt and the ascertainment of Claims (as defined therein) shall be similar to the rules and mechanisms for such things prescribed by the *Corporations Act* in the context of the liquidation of a company, amended or adjusted as appropriate to make the process as cost effective as possible, and section 553C of the *Corporations Act* is such a rule or mechanism.

Further or alternatively, pursuant to section 444A(5) of the *Corporations Act* 2001 read with regulation 5.3A.06 of the *Corporations Regulations* 2001 and clause 8 of Schedule 8A to the *Corporations Regulations*, section 553C of the *Corporations Act* was and is taken to be included in the deed of company arrangement unless the deed otherwise provided, and it did not do so.

159. Within the meaning of section 553C of the *Corporations Act* 2001:
- (a) on the one hand, Ansett's liability to FFPL for the FFPL Deductions, and each of them; and
 - (b) on the other hand, FFPL's liability to Ansett for the FFPL Availed Moneys and (if, which is denied, FFPL has any other liability or liabilities to Ansett in this proceeding), such other liability or liabilities,
- are mutual credits and mutual debts, or further or alternatively are or arise from mutual dealings.
160. In the premises, by operation of section 553C of the *Corporations Act* 2001, Ansett's liability to FFPL for the FFPL Deductions and each of them has been set off, further or alternatively is hereby set off:

- (a) against FFPL's liability to Ansett for the FFPL Availed Moneys; and
 - (b) if, which is denied, FFPL has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
161. Further or alternatively, FFPL will and hereby does, to the extent that it is able under Rule 13.14 of Chapter I of the Supreme Court Rules, set off the FFPL Deductions, and each of them:
- (a) against FFPL's liability to Ansett for the FFPL Availed Moneys; and
 - (b) if, which is denied, FFPL has any other liability or liabilities to Ansett in this proceeding – then against that liability or those liabilities also.
162. Further or alternatively:
- (a) it was a consequence of the relationship of principal and agent between Ansett and FFPL that FFPL was and is entitled by operation of law to a lien as Ansett's agent, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as agent; and
 - (b) further or alternatively, it was a consequence of the relationship of trustee and beneficiary between FFPL and Ansett that FFPL was and is entitled by operation of law to a lien as a trustee for Ansett, over moneys of Ansett in its hands, to secure the payment and satisfaction by Ansett to it of moneys owing by Ansett to it by reason of its performance of its functions as trustee;
 - (c) pursuant to the lien asserted in paragraph 162(a) above or, alternatively, pursuant to the lien asserted in paragraph 162(b) above, FFPL was and is entitled to apply moneys owing by Ansett to it against moneys of Ansett in its hands, in satisfaction of the moneys owing by Ansett to it.
163. In the premises, FFPL holds a lien over the FFPL Availed Moneys (and if, which is denied, it holds any other moneys of Ansett, over such moneys), to the extent of the FFPL Deductions and each of them, and is entitled to, and hereby does, apply the FFPL Deductions against such moneys in satisfaction of the FFPL Deductions owing by Ansett to it.
164. Further or alternatively, it was a consequence of the relationship of principal and agent between Ansett and FFPL:

- (a) that FFPL, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it;
 - (b) that, further or alternatively, it was a term of the agreements between FFPL and Ansett implied by operation of law that FFPL, as agent of Ansett, was and is entitled to set off against, and deduct from, moneys of Ansett held by it or owing by it to Ansett, moneys owing by Ansett to it.
165. Pursuant to the entitlement alleged in paragraph 164(a), or further or alternatively the entitlement alleged in paragraph 164(b) above, FFPL hereby sets off its claims against Ansett for the FFPL Deductions and each of them against, and deducts those claims from:
- (a) its liability to pay to Ansett the FFPL Aailed Moneys; and
 - (b) if, which is denied, it has any other liability or liabilities to Ansett in this proceeding – then that liability or those liabilities also.

COUNTERCLAIM

166. The plaintiffs by counterclaim refer to and repeat by way of positive allegation the admissions contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11(a), 12 and 13 of this pleading.
167. Flight Centre refers to and repeats by way of positive allegation the admissions contained in paragraph 15(a) of the defence.
168. Flight Centre refers to and repeats paragraphs 11(b), 15(c), 16(c), 16(d), 16(e), 16(f) and 54 to 98 (inclusive) of this pleading.
169. To the extent that the Flight Centre Deductions claimed by Flight Centre in paragraphs 54 to 98 (inclusive) of this pleading exceed the amount of the Flight Centre Aailed Moneys, Flight Centre counterclaims for the amount of any excess.
170. ITG refers to and repeats by way of positive allegation the admissions contained in paragraph 18(a) of the defence.
171. ITG refers to and repeats paragraphs 11(b), 18(c), 19(c), 19(d), 19(e), 19(f) and 99 to 133 (inclusive) of this pleading.
172. To the extent that the ITG Deductions claimed by ITG in paragraphs 99 to 133 (inclusive) of this pleading exceed the amount of the ITG Aailed Moneys, ITG counterclaims for the amount of any excess.

173. FFPL refers to and repeats by way of positive allegation the admissions contained in paragraph 21(a) of the defence.
174. FFPL refers to and repeats paragraphs 11(b), 21(c), 22(c), 22(d), 22(e), 22(f) and 134 to 165 (inclusive) of this pleading.
175. To the extent that the FFPL Deductions claimed by FFPL in paragraphs 134 to 165 (inclusive) of this pleading exceed the amount of the FFPL Availed Moneys, FFPL counterclaims for the amount of any excess.

AND THE PLAINTIFFS BY COUNTERCLAIM (DEFENDANTS) CLAIM AGAINST ANSETT THE FOLLOWING:

A. In the case of Flight Centre:

1. Declarations:

- (i) that the Purported Instructions were, and each of them was, of no effect;
- (ii) further or alternatively, that the Purported Instructions, and each of them, had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the respective dates of the Purported Instructions;
- (iii) that Flight Centre was entitled to deduct the Flight Centre Deductions from, and set off each of the Flight Centre Deductions against, Flight Centre's liability to pay the Flight Centre Availed Moneys or, further or alternatively, any other liabilities of Flight Centre to Ansett –
 - (A) in accordance with the terms of the PSAA;
 - (B) further or alternatively, by reason of Flight Centre's right of equitable set off;
 - (C) further or alternatively, by reason of section 553C of the *Corporations Act*;
 - (D) further or alternatively, by reason of Rule 13.14 of Chapter 1 of the Supreme Court Rules;
 - (E) further or alternatively, pursuant to the lien arising from the relationship of principal and agent between Ansett and Flight Centre;

- (F) further or alternatively, pursuant to the lien arising from the relationship of trustee and beneficiary between Flight Centre and Ansett;
- (G) further or alternatively, by reason of the lien in favour of Flight Centre arising at law;

2. Payment of the Flight Centre Base Commission, the Flight Centre Override Commission, the Flight Centre Merchant Amount, the Domestic Ticket Fund and the Flight Centre ACMs.

B. In the case of ITG:

1. Declarations:

- (i) that the Purported Instructions were, and each of them was, of no effect;
- (ii) further or alternatively, that the Purported Instructions, and each of them, had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the respective dates of the Purported Instructions;
- (iii) that ITG was entitled to deduct the ITG Deductions from, and set off each of the ITG Deductions against, ITG's liability to pay the ITG Aailed Moneys or, further or alternatively, any other liabilities of ITG to Ansett –
 - (A) in accordance with the terms of the PSAA;
 - (B) further or alternatively, by reason of ITG's right of equitable set off;
 - (C) further or alternatively, by reason of section 553C of the *Corporations Act*;
 - (D) further or alternatively, by reason of Rule 13.14 of Chapter 1 of the Supreme Court Rules;
 - (E) further or alternatively, pursuant to the lien arising from the relationship of principal and agent between Ansett and ITG;
 - (F) further or alternatively, pursuant to the lien arising from the relationship of trustee and beneficiary between ITG and Ansett;

(G) further or alternatively, by reason of the lien in favour of ITG arising at law;

2. Payment of the ITG Base Commission, the ITG Override Commission, the ITG Subvention Amount and the ITG ACMs.

C. In the case of FFPL:

1. Declarations:

- (i) that the Purported Instruction was of no effect;
- (ii) further or alternatively, that the Purported Instruction had effect only in respect of Traffic Documents issued on behalf of Ansett or Transportation Orders drawn on Ansett after the date of the Purported Instruction;
- (iii) that FFPL was entitled to deduct the FFPL Deductions from, and set off each of the FFPL Deductions against, FFPL's liability to pay the FFPL Availed Moneys or, further or alternatively, any other liabilities of FFPL to Ansett –
 - (A) in accordance with the terms of the PSAA;
 - (B) further or alternatively, by reason of FFPL's right of equitable set off;
 - (C) further or alternatively, by reason of section 553C of the *Corporations Act*;
 - (D) further or alternatively, by reason of Rule 13.14 of Chapter 1 of the Supreme Court Rules;
 - (E) further or alternatively, pursuant to the lien arising from the relationship of principal and agent between Ansett and FFPL;
 - (F) further or alternatively, pursuant to the lien arising from the relationship of trustee and beneficiary between FFPL and Ansett;
 - (G) further or alternatively, by reason of the lien in favour of FFPL arising at law;

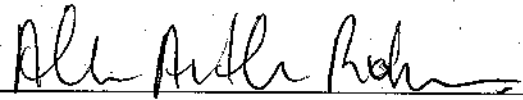
2. Payment of the FFPL Base Commission, the FFPL Override Commission and the FFPL Subvention Amount.

D. In the case of each of Flight Centre, ITG and FFPL:

1. Interest.
2. Costs.
3. Such other relief as the Court may consider fit.

Dated 4 March 2003

G N Rankin



ALLENS ARTHUR ROBINSON

Solicitors for the Defendants and
Plaintiffs by Counterclaim.