IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY

No. V621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED (ACN 004 209 410) & ORS (in accordance with the Schedule attached) (All Subject to a Deed of Company Arrangement)

and

MARK ANTHONY KORDA and **MARK FRANCIS XAVIER MENTHA (as Deed Administrators of the Companies)**

CERTIFICATE IDENTIFYING EXHIBIT

This is the exhibit marked "**MAK-35**" produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit dated 12 September 2005.

Before me:

ALEXANDER DIECLAW KING
ARNOLD BLOCH LEIBLER
LEVEL 21, 333 COLLINS STREET
MELBOURNE 3000
A NATURAL PERSON WHO IS A CURRENT
PRACTITIONER WITHIN THE MEANING OF
THE LEGAL PRACTICE ACT 1996

Exhibit "MAK-35"
Ansett written contentions dated 5 May 2003 in the Allocation Applications

'MAK-35'

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY

NO. V 3051 of 2001

IN THE MATTER of **HAZELTON AIR CHARTER PTY LIMITED (A.C.N. 065 221 356), HAZELTON AIR SERVICES PTY LIMITED (A.C.N. 000 242 928)** and **HAZELTON AIRLINES LIMITED (A.C.N. 061 965 642)** (All Administrator Appointed)

AND

MICHAEL JAMES HUMPHRIS in his capacity as administrator of **HAZELTON AIR CHARTER PTY LIMITED (A.C.N. 065 221 356), HAZELTON AIR SERVICES PTY LIMITED (A.C.N. 000 242 928) and HAZELTON AIRLINES LIMITED (A.C.N. 061 965 642)** (All Administrator Appointed)

Plaintiff

AND

MARK FRANCIS XAVIER MENTHA and **MARK ANTHONY KORDA** in their capacities as administrators of the companies listed in the Schedule attached (All Administrators Appointed)

Defendants

DEFENDANTS' FURTHER CONTENTIONS OF FACT AND LAW

The defendants make the following further contentions of fact and law:

1. NATURE OF APPLICATION AND RELEVANT MATERIAL

1.1 By an application dated 19 October 2001 the plaintiff seeks directions as to and/or a determination of the manner of apportionment of the sum of $150m paid to the defendants pursuant to a Memorandum of

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Understanding dated 30 October 2001 approved by orders of this Court made 12 October 2001.

1.2 At paragraph 52 of the reasons for decision handed down in this proceeding on 29 April 2002 (reported at [2002] 41 ACSR 472) the following direction was made:

> *The application should therefore be stood over for further hearing to enable the parties to present material and submissions on the issue of the extent, assessment and valuation of the claims which were given up in exchange for an interest in the fund of $150m.*

1.3 At the time that decision was handed down the only substantial issue between the parties was the comparative valuation of the claims each gave up in exchange for a share of the $150M fund.

1.4 The issue has become complicated following the execution by the parties of a Settlement Deed on 28 June 2002 which settled this action ("**the Deed**"). That Deed provided for the proceedings to be settled for $3.045M (very slightly more than 2% of the $150M).

1.5 The plaintiff contends that that Deed is ineffective or invalid, which contention the Defendants dispute. The Defendants have amended their claim for relief in this proceeding to seek orders with respect to the Deed.

1.6 If the Deed is valid then this action has been compromised on the terms set out therein and no comparative valuation of the respective claims given up need be embarked upon by the Court. Alternatively, even if the

Deed is ineffective due to some technicality, the Defendants will contend that the Court should order the parties to execute a more perfectly drafted version of the Deed and/or make a direction that the Plaintiff is bound by the terms of that settlement on the basis that the Plaintiff as an officer of the Court ought not rely on legal technicalities in order to avoid obligations.

1.7 In addition to the affidavits listed at paragraph 1.4 of the submissions dated 11 April 2002 and filed on behalf of the plaintiff ("the Original Submissions") the plaintiff has filed four further affidavits:

(a) An affidavit of David Andrews dated 29 May 2002;

(b) An affidavit of Michael Humphris sworn 29 May 2002;

(c) An affidavit of Michael Humphris sworn 15 November 2002;

(d) An affidavit of John Morrison sworn 15 November 2002.

1.8 In addition to the material listed at paragraph 1.5 of the Original Submissions and filed on behalf of the defendants the defendants have filed five further affidavits:

(a) An affidavit of Leon Zwier sworn 20 September 2002;

(b) An affidavit of Mark Korda sworn 26 September 2002;

(c) An affidavit of Bradley Fowler sworn 13 March 2003;

(d) An affidavit of Leon Zwier sworn 22 April 2003;

(e) An affidavit of Mark Korda sworn 30 April 2003.

1.9 The parties have also filed the following court documents dealing with the issue of the settlement:

(a) A notice of motion dated 12 September 2002 filed by the defendants;

(b) A statement of claim dated 10 October 2002 filed by the defendants;

(c) A defence dated 15 November 2002 to the defendants' statement of claim filed by the plaintiff.

1.10 One further development has been that the defendants have advanced a further $1.0M to the plaintiff on the same terms and conditions as the $1.545M referred to in paragraph 1.10 of the Original Submissions (Fowler 13/3/03 paras 28-30, 36, 42-45).

2. THE SETTLEMENT DEED

2.1 Between 7 May and 28 June 2002 extensive negotiations took place between the parties concerning the settlement of these proceedings. These negotiations took place in the context of the negotiation of a proposed sale of the Kendall and Hazelton businesses to Austwide Airlines Pty Ltd ("**AWA**") (see Zwier 20/9/02 paras 56-90, Fowler 13/3/03 paras 5-90).

2.2 At a meeting held on 13 June 2002 and attended by representatives of the plaintiff, the defendant and the Commonwealth Government, agreement in principle on a settlement of these proceedings was reached (Zwier 20/9/92, paras 61-71, Fowler 13/3/03 paras 76-90). Following further negotiation a settlement deed was drafted and agreed (Zwier 20/9/92 paras 77 to 90).

2.3 Negotiations continued between the representatives of Hazelton, Kendall, AWA and the Commonwealth Government concerning the terms on which the Hazelton and Kendall businesses would be sold to AWA. At this time it was thought that based on previous experience it could take up to six months for the Civil Aviation Safety Authority ("**CASA**") to transfer the Air Operators Certificates ("**AOC**") held by Hazelton and Kendall to AWA if a sale of the assets of the businesses occurred. Accordingly it was decided by all parties that the sale of Hazelton and Kendall would proceed by way of sale of shares as this would avoid the need to transfer the AOCs to AWA (Zwier 20/9/03 paras 56 to 60, Fowler 13/3/03 paras 91 to 93).

2.4 On 28 June 2002 Mr Humphris and Mr Fitzgerald, in their capacities as joint deed administrators of the Hazelton Group executed the Deed which provided for the settlement of this proceeding. Execution of the Deed is admitted by the plaintiff (paragraph 9 of the plaintiff's Defence) and a copy of the executed Deed is exhibit LZ22 to the affidavit of Leon Zwier sworn 20 September 2002. A copy of the Deed was executed by Mark Korda on 8 July 2002 (Korda 30/3/03 paras 18 and 19) on behalf of the defendants. There is no doubt that a settlement of these proceedings occurred, see for example Mr Humphris' Circulars to his Committee of Creditors and Creditors (Zwier 20/9/03 paras 91 to 93).

2.5 The plaintiff contends that notwithstanding the execution of the Deed this proceeding is not compromised, on the basis that certain conditions set out in the Deed have not been satisfied. The defendants dispute that the conditions have been satisfied, alternatively, they contend that even if there is some technical legal impediment to the enforcement of the Deed the Court ought order the parties to execute a more perfectly drafted version of the Settlement Deed and/or make a direction that the plaintiff is bound by the terms of that settlement on the basis that the plaintiff as an officer of the Court ought not rely on legal technicalities in order to avoid obligations.

Occurrence of Conditions

2.6 Clause 3 of the Deed provides:

> ***3.1 Conditions***
>
> *This Deed and each Party's rights and obligations pursuant to this Deed are conditional upon:*
>
> *3.1.1 Completion occurring;*
>
> *3.1.2 the Commonwealth:*
>
> *3.1.2.1 assigning the right to recovery of the RRP advances to Austwide and/or releasing the Ansett Administrators, the Hazelton Administrators, Kendall and Hazelton Airlines from repaying the RRP Advances; and*
>
> *3.1.2.2 reaching agreement with Austwide for the provision of $5M to Austwide; and*
>
> *3.1.3 obtaining directions or orders from the Court to the effect that the Parties may properly perform and give effect to this Deed and/or the transactions provided for or contemplated in this Deed.*
>
> ***3.2 Obligations***
>
> *The Parties must use their best endeavours to satisfy the conditions precedent in clause 3.1.*

2.7 On 26 July 2002 the solicitors for the plaintiff wrote a letter (see Zwier 20/9/03 paras 119 and 120) which stated:

"....I hereby confirm that as Completion (as defined) will not now occur the Deed is void and of no effect whatsoever."

2.8 In its defence the plaintiff contends that conditions 3.1.1, 3.1.2 and 3.1.3 have not been satisfied.

Condition 3.1.1 – Completion of Sale of Hazelton and Kendall to AWA

2.9 Condition 3.1.1 refers to the occurrence of Completion. Completion is defined in clause 1.1 of the Deed as meaning the:

> *"completion of the sale of the Hazelton Shares and the Kendall Shares pursuant to the Share Sale Agreements."*

2.10 The Share Sale Agreements are also defined in clause 1.1, as meaning the Hazelton and Kendall Share Sale Agreements, which are in turn also defined in clause 1.1 and copies of which are annexed to the Deed.

2.11 In paragraph 18 of the defence the plaintiff contends that neither of the transactions referred to in condition 3.1.1 occurred.

(a) Hazelton Sale

2.12 In respect of the sale of Hazelton to Austwide the relevant facts are as follows:

(a) on 28 June 2002 the Hazelton Share Sale Agreement was executed (Zwier paras 75 and 76 and exhibit **LZ18**);

(b) by notice dated 22 July 2002 from Hazelton to AWA Hazelton purported to terminate the Hazelton Share Sale Agreement as from 24 July 2002 (Zwier 20/9/03 paras 124 to 127);

(c) however by a Deed of Reinstatement executed 31 July 2002 the Hazelton Share Agreement was reinstated with minor variations. The Deed of Reinstatement provided that the notice terminating the Hazelton Share Agreement was deemed never to have been given. Completion of the Hazelton Share Sale Agreement as reinstated and varied took place on 31 July 2002 (Zwier 20/9/03 paras 128 to 133, Fowler 13/3/03 paras 115 to 120).

(d) in a circular to Creditors dated 1 August 2002 Mr Humphris advised that a sale of Hazelton to AWA:

> *"in accordance with the Sale of Shares Agreement dated 28 June 2002, was successfully completed as of the close of business, 31 July 2002."*

2.13 By virtue of the Deed of Reinstatement the termination of the Hazelton Share Sale Agreement was deemed never to have happened, accordingly completion of the Hazelton sale as envisaged by clause 3.1.1 did occur.

2.14 Further, clause 1.2.8 of the Deed provides:

> *"reference to any document or agreement includes references to such document or agreement as novated, supplemented,* ***varied or replaced*** *from time to time."* [emphasis added]

2.15 Even if the Hazelton Share Sale Agreement as varied and reinstated was considered to be a different agreement, which is disputed, then by virtue of clause 1.2.8 the definition of Hazelton Share Sale Agreement includes that Agreement as varied and reinstated.

(b) Kendall Sale

2.16 In respect of the sale of Hazelton to Austwide the relevant facts are as follows:

(a) on 28 June 2002 the Kendall Share Sale Agreement was executed (Zwier paras 73 and 74 and exhibit **LZ17**);

(b) by late July certain commercial obstacles to the completion of the sale of Kendall to AWA had arisen as a result of the need to utilise a sale of shares mechanism, however AWA was still willing to proceed provided these difficulties could be resolved (Zwier 20/9/03 paras 106 to 110, Zwier 22/4/03 paras 14 to 19, Korda 30/04/03 paras 34 to 40);

(c) these problems could be avoided were the sale to proceed by way of a sale of assets and following intervention by the Commonwealth a way was found for the Kendall AOC to be transferred by CASA within 48 hours, thus allowing the sale of Kendall by way of sale of assets instead of sale of shares to be completed (Zwier 20/9/03 paras 110 and 111, Fowler 13/3/03 paras 99 to 105, Zwier 22/4/03 paras 20 to 23, Korda 30/04/03 paras 41 to 44);

(d) on 26 July 2002 a Kendall Asset Sale Agreement between Kendall and AWA was executed by AWA in substitution for the Kendall Share Sale Agreement (Zwier 20/9/03 paras 112 to 118, exhibit **LZ31**, Zwier 22/4/03 paras 21 to 25, Korda 30/4/03 paras 40 to 48), the Asset Sale Agreement was completed on 1 August 2002 (Fowler 13/3/03 paras 117 to 120);

(e) Recital C of the Kendall Asset Sale Agreement provides:

> *"The parties have agreed to achieve the commercial outcome contemplated by the Share Sale Agreement by way of transfer of assets and certain liabilities pursuant to this document and its annexures such that Australiawide will:*
>
> *(a) acquire from Kendall each of the Assets; and*
>
> *(b) will assume from Kendall certain liabilities and obligations (but specifically excluding the CRJ Debt);*
>
> *that Kendall or Australiawide would have acquired and assumed if the Share Sale Agreement had been completed."*

While Clause 3.1 of that agreement provides:

> *"Subject to the provisions of this document, Kendall sells, and Australiawide purchases, with effect from 1 August 2002 ("the Completion Date") such right, title and interest as Kendall may have in the Assets so as to put Australiawide in the same position it would have been in if the Share Sale Agreement had been completed in accordance with its terms."*

2.17 By virtue of clause 1.2.8 of the Deed the reference in the definition of Completion to the Kendall Share Sale Agreement is taken to include a reference to any agreement which, inter alia, varies or replaces it – it is submitted that this would include the Kendall Asset Sale Agreement.

2.18 Further, any ambiguities or deficiencies that remain in the drafting of any clause of the Deed as a result of the decision to replace the Kendall Share Sale Agreement with the Kendall Asset Sale Agreement can be dealt with via clause 2 of the Deed, which provides:

> *"It is the express intention of the Parties that this Deed records and constitutes an immediately binding agreement between the Parties notwithstanding at the same time the Parties contemplate that, if necessary or reasonably required by the Ansett Administrators or the Hazelton Administrators, the Deed will be engrossed in more perfectly drafted documentation which the Parties agree to execute."*

2.19 By a letter dated 2 September 2002 from the solicitors for the defendants to the solicitors for the plaintiff the defendants requested the plaintiff to execute a version of the Deed which addressed any such drafting issues (Zwier 20/9/03 paras 121 and 122 and paragraphs 8 to 11 of the defendant's statement of claim).

Condition 3.1.2 – Assignment or Release of the RRP Advances

2.20 The RRP Advances (sometimes referred to as RRRP in other materials) are defined in the Deed as being the Commonwealth Government loans referred to in Recitals K and L of the Deed. As Recital L notes, the

Commonwealth had agreed to release these loans on completion of the sale of Kendall and Hazelton to AWA (see Fowler 13/3/03, paras 7 to 20).

2.21 The negotiations for the sale of Kendall and Hazelton to AWA, which negotiations involved the Commonwealth Government, proceeded on the basis that the Commonwealth would forgive the $6.5M worth of RRP loans and that the benefit of this forgiveness would be passed on to AWA by a reduction in the purchase price. The sale transactions, Deed and calculations of purchase prices only worked if the Commonwealth was prepared to release the RRP loans. Representatives of the Commonwealth Government stated on several occasions that the loans would be forgiven following the sale of the two airlines (see Zwier 20/9/03 paras 62 and 63, Fowler 13/3/03 paras 50 to 87 and 121 to 123, Korda 30/4/03 paras 49 to 53).

2.22 Following completion of the sales the Commonwealth has taken no verbal or written action to enforce or call in the RRP loans (as contrasted with the situation prior to the sale where demands for repayment and extensions of loan terms were granted in writing). On 19 July 2002 the Commonwealth wrote to both the plaintiff and the defendants indicating that forgiveness of the loans required a decision by the Finance Minister pursuant to section 34 of the **Financial Management and Accountability Act** 1997. Kendall has requested a formal release of its RRP loan (Fowler 13/3/03 paras121 to 123, Korda 30/4/03 paras 49 to 53). As far as the defendants are

aware, the plaintiff has not taken any action to formalise the Commonwealth's forgiveness of the RRP loan to Hazelton.

2.23 The defendants primary contention with respect to condition 3.1.2 is that the Commonwealth has released the loans, albeit not with formal documentation. Any inaction by the plaintiff with respect to documentation of that release cannot operate so as to invalidate the Deed – it is a matter within his control and clause 3.2 requires him to exercise his best endeavours to satisfy those conditions. Should it be the case that the only issue remaining with this condition is the lack of formal documentation of the release, it is submitted that the Court ought direct Mr Humphris to apply to the Commonwealth for such a documented release.

Condition 3.1.3 – Court Approval

2.24 Condition 3.1.3 refers to the parties obtaining directions from the Court approving the Deed.

2.25 This provision was inserted for the benefit of the plaintiff on the basis that Hazelton creditors may not understand the commercial rationale for the transaction. A notice of motion seeking leave to amend the Application in proceeding V3060 of 2001 so as to include a claim for a Court direction approving the settlement was issued by the defendants on 11 July 2002. With the agreement of the plaintiff this application was adjourned and it was agreed that court approval was not required (Zwier 20/9/03 paras 67, 97 to 105, Korda 30/4/03 para 25).

2.26 The plaintiff is unable to rely on the non-occurrence of a condition he agreed to waive.

Clause 5.1

2.27 In his defence the plaintiff also refers at paragraphs 21 and 22 to clause 5.1 of the Deed and alleges that this clause provides that the Deed is subject to a "*further condition that the Hazelton administrators pay all of the costs and expenses of the Hazelton administration in full.*" and that this clause has "*not yet been satisfied*".

2.28 Clause 5.1 does not in its terms place any condition, let alone a condition precedent, on the validity of the Deed. At most it operates to place a condition on certain payments and transfers of specified property by the Hazelton Administrators. Clause 5 is to be contrasted with Clause 6 which provides for unconditional payments.

Court Order or Direction

2.29 As an alternative submission, the defendants contend that even should there be some technical obstacle to the enforcement of the Deed, or some step which needs to be carried out in order for the Deed to take effect, then the Court has jurisdiction under s447D of the **Corporations Act 2001** and/or the principles espoused in **Ex parte James, re Condon** (1874) LR 9 Ch App 609 to either (as is required):

(a) make a direction to the plaintiff that he ought not rely on such technicalities; and/or

(b) take such step(s) as is necessary to enable the Deed to take effect.

This submission is in addition to the defendants' contention that clause 2 of the Deed provides a mechanism by which any drafting issues can be addressed. The Court's jurisdiction to make such an order is discussed further below.

2.30 When considering whether such an order or direction should be made the defendants contend that the following facts are relevant:

(a) The commercial bargain that the Deed embodies was the result of months of negotiation between the parties, the outcome was a Deed intended to settle these proceedings.

(b) The Hazelton companies received very substantial benefits from Kendall as a result of the execution of the Deed yet are now attempting to avoid paying the agreed price for those benefits.

Following extensive negotiations between Hazelton, Kendall, AWA and the Commonwealth Government it was agreed that the RRP loans would be forgiven (totalling $6.5M for Hazelton and Kendall) with the benefit of this forgiveness to be passed onto AWA by a $6.5M reduction from the total purchase price for the two airlines, $3.0M for Hazelton and $3.5M for Kendall. In the case of Hazelton once $3.0M was subtracted from the purchase price this would require Hazelton to make a payment to AWA. Hazelton did not

have the capacity to make such a payment without drawing on funds earmarked for priority creditors so the compromise which was embodied in the Deed was agreed. Namely, that Kendall would bear the entire $6.5M reduction from the purchase price it was receiving from AWA (thus conferring a benefit of $3M on Hazelton) but that Hazelton would transfer assets worth up to $3M (comprising some land, spares and rotables, plant and equipment and aircraft security bonds and including a notional $500,000 received under the settlement of these proceedings) in exchange for receiving this benefit (see Zwier 20/9/03 paras 61 to 71, 77 to 90, Fowler 13/3/03 paras 46 to 90, and clauses 5 and 6 of the Deed).

As a result of the execution of the Deed and the sale of the Kendall and Hazelton airlines to AWA on the terms contemplated in the Deed, Kendall took a $3M subtraction from the purchase price to the benefit of Hazelton. However, Hazelton has refused to transfer any of the assets intended to be the price to be paid to Kendall for the conferral of this benefit, in particular Hazelton has not transferred certain aircraft security deposits (see Zwier 20/9/03 para 134, Fowler 13/3/03 paras 117 to 120).

The overall result is that Hazelton has accepted the benefits to it under the Deed but without performing its obligations under same.

(c) the contentions made by the plaintiff in relation to the Deed are technical and, it is submitted, without substantive merit. They focus upon the precise mechanism by which the sale of Kendall occurred rather than the fact that the same commercial outcome resulted and upon matters within Mr Humphris' control, for example documentation of the Commonwealth's forgiveness of the RRP Loans.

(d) The distinctions in the mechanism by which the sales were carried out which the plaintiff purports to rely upon as justifying the inoperability of the Deed are not distinctions he made in his dealings with other creditors of Hazelton (remembering that the Ansett group is a substantial creditor in the Hazelton administrations). For example, in his Circular to the Committee of Creditors dated 4 July 2002 (Zwier 20/9/03 para 91 and 92) Mr Humphris states that it was a condition of the settlement that:

> *"the sale of the businesses* [Kendall and Hazelton] *to Australiawide is completed"*

(e) Further, the plaintiff purports to rely against Kendall on a condition which he has waived in his dealings with AWA. Clause 3.1(a) of the Hazelton Sale of Shares Agreement included a condition precedent as follows:

> *"Completion of this agreement is subject to:*

(a) *Bodas Pty Ltd (subject to Deed of Company Arrangement) ACN 002 158 174) executing the Share Sale Agreement for Kendall;*

This condition is almost identical to that contained in clause 3.1.1 of the Deed.

Clause 3.1 of the Hazelton Share Sale Agreement was deleted in its entirety by clause 3.2 of the Deed of Reinstatement dated 31 July 2002.

2.31 **Ex parte James** is the first case in a line of authority which deals with the standard of behaviour expected of officers of the Court. As James LJ decided (at page 614):

> *"I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given to him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."*

See also **Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)** (1948) 76 CLR 463, at 481 to 483.

2.32 **Commissioner for Corporate Affairs v Harvey** [1980] VR 669 is an example of the application of these principles to a court appointed

liquidator. After finding that such a liquidator is an officer of the Court, Marks J stated (at page 696):

> *"It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the Court."*

2.33 In the present case both the Hazelton and Ansett Administrators were appointed by Court order. Further, the exercise of their powers is subject to the direction of the Court pursuant to the provisions of Part 5.3A of the **Corporations Act** 2001. It is submitted that accordingly they are either officers of the Court or stand in a position analogous to one by virtue of the Court's power to direct the exercise of their powers. In the United Kingdom it has been held that administrators are officers of the court, are subject to an inherent power of the court to direct their actions and as officers of the court are subject to the application of the rule in **Ex parte James** (see **Re Atlantic Computer Systems** [1992] Ch 505, at 543 and **Re Mark One (Oxford Street) plc** [1999] 1 All ER 608, at 610-11).

2.34 The bulk of modern authority addressing **Ex parte James** deals with claims for money paid or financial benefits conferred on an officer of the Court in circumstances where it would be unfair for the officer to retain that money or benefit, see for example **Hartogen Energy Ltd v AGL Co** (1992) 36 FCR 557, at 571-577. In **Hartogen**, a case dealing with a liquidator, Gummow J opined (at page 574) that the power of the Court

pursuant to the principle in **Ex parte James** was better understood as outlining the matter in which the court controls the way liquidators exercise their powers – in that case pursuant to section 377(5) of the NSW **Companies Code** (the **Corporations Act** equivalent being section 477(6)).

2.35 In the present case the retention by Hazelton of the benefit of the Deed without performing its obligations would found jurisdiction to make an order either under the principles in **Ex parte James** or under the statutory power to give directions to an administrator on the basis that the conduct of Mr Humphris as an officer of the Court is unfair to Ansett.

2.36 Further, notwithstanding that the focus has been on cases involving mistaken payments, there are a number of modern cases where **Ex parte James** has been applied to other conduct of an officer where the insistence by that officer on his strict legal rights would produce an unjust or unfair result - the possibility of such an order being expressly left open by Gummow J at page 576 of **Hartogen**.

2.37 In **re Douglas, ex parte Starkey** (1987) 15 FCR 475, a case involving a trustee in bankruptcy, Pincus J held at page 480 that it was doubtful whether, consistent with the rule in **Ex parte James**, the trustee could rely on a technical argument concerning the precise form of a security.

2.38 In the recent decision of **Ebner v Official Trustee in Bankruptcy** [2003] FCA 73 (Finkelstein J, 14 February 2003) his Honour held that the rule in

Ex parte James permitted him to take a step for which he may have lacked power but so as to avoid injustice:

> *"It may be doubtful whether what I propose to do is permissible; however, I intend to take this rather unusual course in order to avoid injustice. I am encouraged to do so because this is a bankruptcy case where the rule* ***in Ex parte James*** *(1874) 9 Ch App 609 can be applied. The rule is that a trustee in bankruptcy need not insist on strict application of rules of law or equity in the determination of the estate where insistence would produce an unjust or unfair result."*

2.39 It is submitted that it is open to the Court in the present case to make an order or direction of the types listed in paragraph 2.29 above so as to avoid an unjust and unfair result.

Estoppel/ Waiver/Election

2.40 In his defence the plaintiff contends that the defendants are estopped from maintaining that the proceeding was settled by the execution of the Deed. The plaintiff relies upon discussions that occurred at meetings on 26 and 29 July 2002 to support the allegation of an estoppel.

2.41 The defendants dispute the plaintiffs' factual allegations regarding these meetings, see Zwier 23/4/03 at paras 27 to 29, Fowler 13/3/03 at paras 106 to 114 and Korda 30/4/03 at paras 26 to 29. The alleged representations either were not made, were not made in the terms alleged or could not as a matter of law amount to representations binding the entire Ansett group.

2.42 Even if such a representation was made there is no evidence of detrimental reliance. There is no evidence that the plaintiff took any specific action in reliance on any representation allegedly made on behalf of the Ansett group or that any detriment was suffered. The plaintiff revived the sale of Hazelton to AWA and sold Hazelton on the same terms and conditions as had been originally agreed and which were contemplated by the Deed. No evidence of any loss suffered in reliance on the representations alleged has been provided, and any calculation of loss would need to take into account the very substantial benefit (at least $3M) the Hazelton companies received.

2.43 The plaintiff also relies upon a variety of waiver and election arguments. These arguments are misconceived. There is no evidence of a choice by Kendall between inconsistent options. Kendall continued to perform its obligations under the Deed and completed the sale of its business to AWA on the same terms and conditions as had been contemplated by the Deed. There is no evidence of any action by Kendall that is inconsistent with the continued operation of the Deed (see Zwier 23/4/03 paras 18 and 27 to 28, Fowler 13/3/03 paras 117 to 120 and Korda 30/4/03 at paras 34 to 46).

3. THE EXTENT AND ASSESSMENT OF THE CLAIMS RELEASED

3.1 If the Settlement Deed is not binding or the Court does not direct the plaintiff to perform it as if it were, then the Court will need to consider the issue of the comparative valuation of the claims surrendered pursuant to the Memorandum of Understanding ("**MOU**") in exchange for the $150M payment by Air NZ. The defendants' position is that the Hazleton companies had no viable claims against Air New Zealand and thus the value of the claims surrendered by the plaintiff pursuant to the MOU was zero. The defendants contend that the claims which certain Ansett Group companies of which they are the Administrators surrendered were, and were regarded by Air New Zealand as being, of substantial value, and it was the surrender of these claims for which the payment of $150M was made. On this basis the defendants contend that the plaintiff is not entitled to any share of the $150M fund, other than an amount representing the "nuisance" value of elimination of potential claims, however ill-founded.

The Memorandum of Understanding and the Letter of Comfort

3.2 For present purposes the relevant terms of the Memorandum of Understanding (Exhibit A1 in 3045 and "MFXM3" to Mentha 8/10/01 in 3045) are the following:

(a) By Clause 9, the Air New Zealand Group and the Directors (as defined) agreed to procure the New Zealand Government to pay to the defendants the sum of $150m.

(b) By Clause 11, the Air New Zealand Group and the Directors agreed not to prove in the administration or liquidation of the Ansett Group (which under the Memorandum of Understanding includes the Hazelton companies) and to waive all entitlements to be repaid funds advanced to the Ansett Group. This release and waiver released loans (and other debts) due as a result of advances made prior to administration and also released an obligation to repay $32m advanced in order to meet wages after administration which, in a liquidation, would have been entitled to the same priority as the wages themselves pursuant to s. 560 of the **Corporations Act**.

(c) By Clauses 12 and 12A, the administrators (both the Ansett administrators and the Hazelton administrator) and the Ansett Group agreed to accept the payment of $150m in full satisfaction of any outstanding liability under a letter dated 8 August 2001 ("the Letter of Comfort").

(d) By Clause 13 (subject to Clause 22), the Ansett Group and the administrators (of both Ansett and Hazelton) released the Air New Zealand Group and the Directors from all claims relating to management of the Ansett Group or dealings between the Ansett

Group and the Air New Zealand Group. Clause 22 provided that the Directors represented and warranted that they had not acted other than in good faith and for a proper purpose (within the meaning of s. 181 of the ***Corporations Act***), had not acted Recklessly (as defined), and had not breached s. 184 of the ***Corporations Act***. Clause 22 provided that the release in clause 13 would not operate if there were a breach of these warranties and provided that the release in clause 13 did not prevent the commencement of proceedings alleging an absence of good faith, an improper purpose, recklessness, or a breach of s.184.

3.3 Clauses 12 and 12A of the MOU focus attention on the release of possible claims under the Letter of Comfort as the consideration given for the payment of $150m.

3.4 A copy of the Letter of Comfort (Exhibit A2 in 3045) is attached. It is addressed to:

"*THE DIRECTORS*

Ansett Holdings Limited (ABN 085 117 635)

Ansett International Limited (ABN 060 622 460)

Ansett Australia Limited (ABN 004 209 410)"

("the Ansett addressees").

3.5 It is submitted that the Letter of Comfort falls into two parts. The first part contains a typical representation falling within the description: "letter of comfort". This part is subject to an express statement that no contract is thereby created:

> *"The previous paragraphs set out our bona fide intention in respect of the matters mentioned, but shall not create any contract between us and any of you, nor a guarantee nor indemnity in respect of our obligations hereunder, enforceable at law or in equity."*

3.6 As a result of the express disclaimer as to legal liability with respect to the first part of the Letter of Comfort there are no viable legal claims against Air NZ by any entity with respect to that part of the Letter of Comfort. Further, the Letter is not addressed to the Hazelton companies.

3.7 The second part, which begins "*notwithstanding the previous paragraph*", says that Air New Zealand Ltd will make available "*to you*" (i.e. the three addressee companies, all of which are companies for which the Defendants are appointed Administrators) advances up to a maximum of A$400m from time to time -

> *"for the sole purpose of enabling you to pay working capital liabilities incurred by you in respect of property or services purchased or sold in the ordinary course of your business".*

The Letter of Comfort is expressed to be governed by New Zealand law.

Assessment of Ansett Claims

3.8 The board material obtained from Air New Zealand (see paragraphs 4 to 8 of the affidavit of Leon Zwier sworn 20 September 2002 and Confidential Exhibits **LZ2** and **LZ3** to same) confirms that the decision to extend the Letter of Comfort to only the three named Ansett addressees was a deliberate one, and that there was no reference to any of the Hazelton companies.

3.9 In proceeding 3045 Air New Zealand personnel and advisers filed extensive affidavits dealing with the potential claims against Air New Zealand and the reasons which prompted Air New Zealand to make the settlement proposals which eventually resulted in the Memorandum of Understanding. It is submitted that the material filed on behalf of Air New Zealand demonstrates that the claim which was perceived to be of concern to Air New Zealand (and consequently of "value" to Ansett) was that contained in the second part of the Letter of Comfort, being the $400m working capital loan facility claim: see ***Farmer*** (paras. 56-57), ***France*** (paras. 7, 16-19, 26-30, and 41) and ***Waller*** (paras. 16, 18, 20-21). The Air New Zealand material devotes little (if any) attention to potential claims against directors. It does not refer to any potential claim by any of the Hazelton companies.

3.10 The perceived importance of the potential claims in respect of the Letter of Comfort are confirmed by the structure of the Memorandum of Understanding – clause 12 (emphasised by clause 12A).

3.11 The Ansett position in relation to the legal significance of the claims released was relevantly set out in two confidential exhibits to Mentha's affidavit of 8/10/01 in 3045 and in a confidential submission (copy attached). The two confidential exhibits were the Arnold Bloch Leibler advice in relation to the Letter of Comfort ("MFXM11"), and the advice from a New Zealand Queens Counsel, Mr Paul Heath ("MFXM12").

3.12 It is submitted that the Ansett material filed in 3045 reflects a similar analysis to that set out in the Air New Zealand material. The strength of the potential claim is seen to reside in the ability of the Ansett addressees to call for performance of the working capital loan facility obligation in the second part of the Letter of Comfort. As at August 2001 the Ansett Group companies had a working capital deficiency of approximately $428M (see paragraphs 74 to 80 of the affidavit of Mark Korda sworn 26 September 2002).

3.13 It is submitted that the Ansett administrators rightly apprehended that any contractual claim under the first part of the Letter of Comfort (the "quasi-guarantee") would be weak, if not untenable. Further, it is submitted that they rightly apprehended that any claim for misleading and deceptive conduct would face the significant impediment that only "reliance" damages could be claimed and there would be only a very short period during which such a reliance loss might be open to be proved.

3.14 The three Ansett addressees did have viable contractual claims against Air New Zealand. Air New Zealand promised to provide those companies with a $400M loan facility. A demand had been made under the Letter of Comfort which demand had not been complied with. The Ansett companies had a working capital deficiency of approximately $428M in respect of which they could have demanded the provision of loan funds.

Assessment of Hazelton Claims

3.15 On the approval applications (both 3045 and 3046) the Hazelton administrator suggested that the Hazelton companies' position was affected by the short period of their association with Air New Zealand, and that their position was "once removed" from that of the Ansett companies. Mr Humphris recognised the relevance of the fact that the Letter of Comfort was not addressed to the Hazelton companies and that it recorded an intention to make available advances to the three named companies for a specific purpose. In this respect reference is made to the affidavit of Mr Humphris sworn 8 October 2001 in 3046 at paragraph 9 and to the observation made on behalf of the Hazelton administrator on 9 October 2001 at Transcript p. 42 and on 10 October at Transcript p. 27-28 (copies attached).

3.16 In this proceeding the plaintiff's contentions concerning the claims available to it are contained in:

(a) Paragraphs 26-32 of the affidavit of Michael Humphris sworn 22 October 2001;

(b) Paragraphs 4-16 of the affidavit of Michael Humphris sworn 29 May 2002;

(c) Paragraphs 47 to 56 of the Plaintiffs' Contentions of Fact and Law dated 11 April 2002.

3.17 A number of potential Hazelton claims are referred to in this material:

(a) a claim under the first part of the Letter of Comfort;

(b) a claim under the second part of the Letter of Comfort;

(c) a claim for reliance loss;

(d) a claim that the Hazelton directors were entitled to call upon Air New Zealand under the Letter of Comfort;

(e) a claim based on the making of intercompany loans between Ansett Australia Holdings Pty Ltd and Hazelton Airlines Ltd;

(f) a claim based on the principles set out in **Trident General Insurance Co v McNiece**;

(g) a claim against directors

Each of these potential claims is examined below.

(a) Hazelton claim under the first part of the Letter of Comfort

3.18 In relation to possible claims under the Letter of Comfort, Mr Humphris' 22 October 2001 affidavit suggests potential reliance on the first part of the letter. He quotes that part of the letter (para. 26) and he refers to the suggestion that "*under Australian law letters of comfort are not necessarily treated as being contractual in nature*" (para. 26). He does not quote the paragraph of the Letter of Comfort which reads:

> *"The previous paragraphs set out our bona fide intention in respect of the matters mentioned,* ***but shall not create any contract between us and any of you, nor a guarantee nor indemnity in respect of our obligations hereunder, enforceable at law or in equity."*** [emphasis added]

3.19 In the face of this explicit disclaimer it is very difficult to see how a submission that the first part of the letter created enforceable rights in any person could succeed. Even if the first part of the letter did create some enforceable legal obligation, the letter states that Air New Zealand "*confirms to you*", you being the addressees not the Hazelton companies. The mere fact that the Hazelton companies, as wholly owned subsidiaries, might have indirectly benefited from performance of Air New Zealand's commitments does not create enforceable legal rights in the Hazelton companies.

(b) Hazelton claim under the second part of the Letter of Comfort

3.20 Mr Humphris does not expressly address any possible claim under the second part of the Letter of Comfort in his 22 October 2001 affidavit, implicitly recognising the great difficulty which would have faced a "non-addressee" subsidiary in making a claim under the working capital loan facility obligation in the second part of the letter. Claims under the second part of the letter were the only really viable claims, and were the claims Air New Zealand was most anxious to eliminate.

3.21 A further difficulty that any potential claim by Hazelton under the second part of the Letter of Comfort would have faced is the requirement by Air New Zealand that any funds advanced be used:

> *"for the sole purpose of enabling you to pay working capital liabilities incurred by you in respect of property or services purchased or sold in the ordinary course of your business"*

3.22 The material filed by the plaintiff in this case and contained in his reports to creditors indicates that the Hazelton companies did not have any working capital shortage in respect of which a claim on the $400M fund could be sought:

(a) In his 10 December 2001 Report to Creditors (a copy of which is exhibited as exhibit CGE-2 to the affidavit of Colin Egan sworn 27 March 2002) Mr Humphris records at page 15 that as at 12 September 2001 the Hazelton companies had working capital of

$6.455M (See also paragraph 11 of Colin Egan's affidavit sworn 27 March 2002).

(b) In this respect Mr Humphris' report confirms the conclusions reached in paragraphs 9 to 13 of Colin Egan's affidavit sworn 14 November 2001 where he undertook an analysis of the figures then available so as to demonstrate that whereas Hazelton had had no working capital shortfall, the working capital shortfall within the Ansett group had been very substantial. The solvency of the Hazelton companies is confirmed by paragraph 9 of Mr Humphris' 29 May 2002 affidavit.

(c) A detailed analysis of the solvency and working capital situation of the Hazelton companies is contained at paragraphs 14 to 29 of the affidavit of Mark Korda dated 26 September 2002. Mr Korda concludes that the Hazelton companies were solvent and did not have a working capital deficiency.

(c) Hazelton claim for reliance loss

3.23 Mr Humphris' 22 October 2001 affidavit (para. 28) appears to suggest a possible claim for a reliance loss, presumably by way of a claim pursuant to section 52 of the **Trade Practices Act** or some form of estoppel. Mr Humphris opines that:

"It is quite feasible that a claim could have been made by the Hazelton Group against Air New Zealand arising out of reliance or

steps taken as a consequence of the Letter of Comfort (claims from which I have now released Air New Zealand and its directors)."

3.24 Even assuming that the representations in the Letter of Comfort were in fact misleading when made, i.e. were made without reasonable grounds (of which there is no evidence), the Ansett administrators submit (again consistently with the position they have maintained throughout) that any potential for such a claim was very limited, being referable (at most) to possible detrimental reliance in the period between 8 August and 12 September 2001. No loss in that period is suggested.

3.25 Mr Humphris himself recognised that as at the time of preparing that affidavit he was unable to determine the possible merits of any such claim and would need to investigate the matters listed in items (a) to (f) at paragraph 28.

3.26 Upon reviewing Mr Humphris' 29 May 2002 affidavit it is apparent that it addresses none of the matters Mr Humphris thought needed to be investigated in order to establish a "reliance" claim, in particular:

(a) no evidence has been led to show that the Hazelton boards ever considered or referred to the letter's contents;

(b) no evidence has been led showing that management within the Hazelton companies either received or knew about the Letter of Comfort;

(c) No evidence has been led suggesting any copy of the Letter of Comfort exists amongst the records of the Hazelton companies;

(d) no evidence has been led concerning any action taken in reliance on receipt of or knowledge of the Letter of Comfort's existence;

(e) no evidence has been led to show that the Hazelton companies either requested or received funds advanced in accordance with the Letter of Comfort.

3.27 Whilst it is understandable that investigation of these matters may not have been undertaken by 22 October 2001, if such evidence did exist it ought to have been identified by now, more than eighteen months after that affidavit was sworn.

(d) Claim by Hazelton directors

3.28 In his 29 May 2002 affidavit Mr Humphris returns to the possibility of a claim under the Letter of Comfort at paragraphs 14 and 15:

> *"In addition, the Hazelton directors as common directors of the Ansett Group were entitled to call upon Air New Zealand under the Letter of Comfort to fund any ongoing financial requirements of the Hazelton Group as a wholly owned subsidiary of the Ansett Group."*

3.29 Presumably this is another reference to a possible claim under the first part of the Letter of Comfort, as indicated by the reference to the Hazelton companies being "*wholly owned subsidiaries*".

3.30 The basis of this "*entitlement*" is stated to be the existence of some overlap between the directors of the Hazelton companies and some of the Ansett group companies. Mr Humphris appears to contend that this overlap gave the directors of the Hazelton companies a legally enforceable right to call on the Letter of Comfort for the benefit of the Hazelton companies.

3.31 There are a number of obvious difficulties with such a contention:

(a) The Letter of Comfort is addressed to particular Ansett group companies, it does not give rise to a personal right of action residing in the individuals who happen to constitute the directorship of the addressee companies at that time.

(b) Even if a personal right of action did exist it would only be with respect to those individuals' role as directors of the addressee companies. It is not tenable to suggest that the Letter of Comfort gives those individuals a right of action with respect to any other company, not being an addressee, of which they happen to be directors.

(c) In any event a claim under the first part of the Letter of Comfort faces the problem referred to in paragraph 3.18 above, namely, the explicit statement by Air New Zealand that no enforceable legal rights are created by reason of the letter.

(e) Intercompany loans claim

3.32 In paragraph 16 of his 29 May 2002 affidavit Mr Humphris refers to and exhibits five loan transaction documents recording loans from Ansett Australia Holdings Pty Ltd (referred to as the "Lender" in each document) to Hazelton Airlines Ltd (referred to as the "Borrower" in each document). The loans span the period 20 June to 31 August 2001. Presumably based on the fact that each loan document bears a facsimile header indicating that the document was faxed from "AIR NZ TREASURY" Mr Humphris contends that these documents indicate that loan funds were received by Hazelton from the Air New Zealand treasury.

3.33 Leaving aside the fact that the terms of the loans clearly indicate that the loans were by Ansett Australia Holdings Pty Ltd and that only the last loan postdates the Letter of Comfort (there being no suggestion it was pursuant to the Letter of Comfort), the fact that funds provided by Air New Zealand to Ansett may have in turn been lent by Ansett to Hazelton does not give rise to a right in Hazelton to require further loans to be made, either by Ansett or Air New Zealand (see paragraphs 115 to 120 of the affidavit of Mark Korda sworn 26 September 2002).

(f) Trident claim

3.34 Paragraph 49 of the plaintiff's Contentions of Fact and Law dated 11 April 2002 also refers to a possible claim under the letter of Comfort:

"a claim as a third party who was intended to receive a benefit under the contractual arrangement between Air New Zealand and the three named Ansett Companies in the Letter of Comfort"

referring to **Trident General Insurance Co Limited v McNiece** (1988) 165 CLR 107 and to a claim under section 52 of the **Trade Practices Act** in respect of representations under the Letter of Comfort.

3.35 The claim under **Trident** is misconceived. That decision simply does not stand for the proposition that the plaintiff puts forward, namely, that a legally enforceable right exists in any third party intended to benefit from a contract to enforce that contract despite the absence of privity. As Gummow J noted in **Winterton Constructions Pty Ltd v Hambros Australia Ltd** (1991) 101 ALR 363, at 368:

"Trident is a decision of all members of the High Court. At best from the viewpoint of Winterton, there is support by only three of their Honours (Mason CJ and Wilson J (CLR) at 123-4, Toohey J (CLR) at 172) for the proposition that in addition to the qualifications and exceptions already established to the doctrine of privity of contract, the old rules do not apply in their full vigour. And their Honours confined their decision to the position of third parties claiming under some policies of insurance. Gaudron J (CLR at 173) expressly differed from Mason CJ and Wilson J, and founded

liability in restitutionary principles which operated dehors the contract in question."

See also the survey of post-**Trident** cases carried out in the article "Why Place Trust in a Promise" (1999) 73(5) ALJ 354 at 362-3. There is no post-**Trident** authority for the proposition the plaintiff advances.

3.36 Even if the principle the Plaintiff contended for did exist, an attempt to rely upon the first part of the Letter of Comfort cannot succeed in the face of the express statement that the Letter does not give rise to a contract or create legal rights.

3.37 A claim based on the second part of the Letter of Comfort will also fail. The key element of **Trident** was a promise by the insurance company (Trident) to the insured (Bluetooth) to indemnify not only Bluetooth but also its contractors, including McNeice, against certain risks. That the contract contained a specific promise to indemnify persons in the position of McNeice was regarded as vital by the three High Court members who decided that McNeice could recover under the contract despite the absence of privity. As Mason CJ and Wilson J found at page 124:

"This argument [that a right to sue should exist] *has even greater force when it is applied to an insurance against liabilities which is expressed to cover the insured and its sub-contractors"*

while Toohey J concluded (at page 172):

"When an insurer issues a liability insurance policy, identifying the assured in terms that evidence an intention on the part of both insurer and assured that the policy will indemnify as well those with whom the assured contracts for the purpose of the venture covered by the policy, and it is reasonable to expect that such contractor may order its affairs by reference to the existence of the policy, the contractor may sue the insurer on the policy..."

3.38 That situation does not arise here. There is no promise by Air New Zealand to Ansett to make payments to Hazelton, rather there is a promise by Air New Zealand to make funds available "*to you*" for the sole purpose of enabling "*you*" to pay working capital liabilities incurred "*by you*" in respect of "*your business*". There is no basis for concluding that the "*you*" repeatedly referred to in the second part of the Letter of Comfort is a reference to anyone other than the "*you*" referred to in the first part, namely the addressee Ansett Companies. When the authors intend to refer to subsidiaries of the addressee companies (as is the case in the first part of the letter only, there is an express reference to subsidiaries).

3.39 The present situation is similar to that dealt with by Gummow J in **Winterton**. As His Honour found in that case (at page 367):

"Winterton contends that despite the lack of privity, it might, consistently with Trident, recover by action against Hambros. But there was no "third party" contract here, of the nature discussed in

Trident. There was no promise of Hambros to Pan to pay Winterton."

The same situation prevails here, there is only a promise by Air New Zealand to pay (by way of advancing loan funds) the addressee Ansett companies, there is no promise by Air New Zealand to Ansett to lend moneys to Hazelton.

(g) Claims against directors

3.40 In paragraphs 30-32 of his 22 October 2001 affidavit, Mr Humphris raises the possibility of claims against the directors of the Hazelton Group companies but notes that he cannot say what those claims may have been without further investigation which he had not, at that time, had the opportunity to conduct.

3.41 In his 29 May 2002 affidavit Mr Humphris does not specify any claim which the Hazelton companies may have had against the directors but for the release contained in the Memorandum of Understanding. There is a vague suggestion in paragraph 10 that the Hazelton directors should not, in Mr Humphris' opinion, have borrowed money from Ansett with short term maturity dates but this could not amount to a viable claim. The funds borrowed were used to pay off other debt (see paragraphs 100 to 102 of the affidavit of Mark Korda sworn 26 September 2002), there is no evidence that funds were available on longer terms and there has been no loss suffered by reason of the maturity dates of the loans.

3.42 At paragraphs 92 to 114 of his affidavit sworn 26 September 2002 Mark Korda summarises the results of investigations carried out by ASIC, the Ansett Administrators and the plaintiff. In short, there is no evidence of viable claims against the directors which were released pursuant to the MOU.

3.43 None of the potential claims suggested by Mr Humphris, either pursuant to the Letter of Comfort or otherwise, had any prospect of success.

Other issues raised by the Plaintiff

3.44 Mr Humphris' affidavit sworn 29 May 2002 also addresses a number of other topics:

(a) At paragraphs 4 to 8 Mr Humphris develops a contention to the effect that because Air New Zealand agreed not to prove for certain debts in the administration of the Ansett Group companies but the Ansett Group companies did not agree to release the Hazelton companies then those Ansett Group companies received a benefit under the Memorandum of Understanding that was not received by the Hazelton companies. Leaving aside the fact that there does not appear to have been any comparable debts for Air New Zealand to have released against the Hazelton companies (nor indeed was such a release requested by Mr Humphris) this contention, even if correct, has no bearing on the question of the extent, assessment and valuation of claims released by the Ansett Group companies

and Hazelton against Air New Zealand. In any event there is no prospect of the Ansett Group companies as unsecured creditors of the Hazelton companies receiving any dividend in the administration or liquidation of those companies (see paragraphs 121 to 128 of the affidavit of Mark Korda sworn 26 September 2002).

(b) At paragraphs 9 to 11 Mr Humphris confirms that the Hazelton Group was solvent prior to administration but that the administration of the Ansett Group companies made the entry into administration of the Hazelton companies a necessity. This is relevant in the light of comments by Mr Humphris previously to the effect that he was investigating the conduct of the directors of the Hazelton companies in placing them into administration.

(c) At paragraphs 17 to 28 Mr Humphris describes the circumstances that led to him executing the Memorandum of Understanding. These matters are not relevant to the issue of the nature and value of the claims forgone in exchange for the $150M.

3.45 The Plaintiff has also filed an affidavit of David Andrews sworn 29 May 2002. Mr Andrews, the solicitor for the Plaintiff, deposes to the events leading to the Plaintiff's execution of the Memorandum of Understanding. These matters are not relevant to the issue of the nature and value of the claims forgone in exchange for the $150M.

4 THE VALUATION OF THE CLAIMS RELEASED

4.1 As noted above in paragraphs 3.8 to 3.14 the potential claim considered by the defendants, and it is submitted by Air New Zealand, as having real value was the claim under the second part of the Letter of Comfort. Pursuant to this the addressee Ansett companies could have brought an action seeking specific performance of the obligation to lend up to $400M, or sought damages for the failure to lend.

4.2 The defendants' valuation of these claims are set out at:

(a) paragraphs 81 to 91 of the affidavit of Mark Korda sworn 26 September 2002

(b) paragraphs 5 to 17 of the affidavit of Mark Korda sworn 30 April 2003.

4.3 When valuing the claim the Ansett companies had in respect of a breach of an obligation to lend funds under the MOU the measure of damages is the difference between two hypothetical scenarios:

(a) a scenario where Air New Zealand did perform the obligation, i.e. lent up to $380M (being the $400m less $20M already advanced to the initial Administrators on account of wages) to the Ansett companies on demand;

(b) a scenario where no funds whatsoever were provided to the Ansett companies, either by way of loan or pursuant to the MOU.

4.4 The quantum of damages for a breach of an obligation to lend under the Letter of Comfort is total estimated Ansett realisations under (a) minus total Ansett realisations under (b).

4.5 Several alternate calculations of the quantum of this claim are set out in the affidavits of Mark Korda:

(a) on the basis that had loan funds been provided the Ansett group could have avoided administration entirely, continued trading and been sold as a going concern – approximately **$2 billion dollars** (paragraph 87 of the affidavit of Mark Korda sworn 26 September 2002)

(b) on the basis that had loan funds been provided the mainline airline would not have had to cease operations and could have been sold as a going concern – at least **$380 million dollars** (paragraph 87 of the affidavit of Mark Korda sworn 26 September 2002);

(c) on the basis that had $150M been advanced as loan funds (but with no merger with Virgin Blue – see below) then the amounts realised would have been the same as present realisations ($600M) less the $150M which would have to be repaid instead of retained, giving realisations of $450M. From this must be subtracted the amounts

which it is estimated would have been realised without any funds whatsoever being provided (approximately $150M less, or $300M) giving a damages claim of approximately **$150 million dollars** (see paragraphs 12 to 17 of the affidavit of Mark Korda sworn 30 April 2003).

(d) the same scenario as (c) above, but with additional loan funds (up to $380M instead of $150M) being drawn down so as to permit the Ansett Administrators to merge with Virgin Blue. Such a merger is estimated to have led to a profit of $490M on that transaction alone, giving rise to a damages claim of $600M (present realisations) plus $490M (from Virgin Blue merger) less repayment of the entire $380M loan less $300M (amount that would be realised without any funds provided) giving a damages claim of approximately **$410 million dollars** (see paragraphs 7 to 9 and 12 to 17 of the affidavit of Mark Korda sworn 30 April 2003).

4.6 Based on these calculations it is submitted that had a Court faced the task of assessing a damages claim by the Ansett companies for breach of the obligation to lend under the Letter of Comfort then the quantum of damages awarded would have been at least $150 million dollars.

4.7 In respect of potential claims by the Plaintiff, it is the defendants' primary position that as those claims had no prospect of success they have no value. Were the Court to decide that the claims had some value beyond

the merely nominal (reflective of "nuisance" value only) then the onus remains on the plaintiff to present a valuation of those claims.

4.8 The only attempt by the plaintiff to quantify the various claims he has suggested as open to him in dollar figures appears to be contained in paragraph 13 of the affidavit of Mr Humphris sworn 29 May 2002. That paragraph states that:

> *"Hazelton incurred the following trading losses, consequential losses and costs and also required monies in the amounts set out below to ensure that it could meet its debts as they fell due or by way of working capital"*

and then specifies those amounts as totalling between $51.8M and $82.1M. These figures listed opposite (a) ("trading losses") are the total losses incurred in the course of the administration in the period 12 September 2001 to 23 February 2002 while the figures listed opposite (b) ("consequential losses") are the Plaintiff's estimate of the Hazelton companies' net deficiency once liabilities are subtracted from assets.

4.9 Why the quantum of the plaintiff's possible damages under claims it released against Air New Zealand should be equal to these amounts is not stated. A claim based on reliance damages would not include any of these amounts as they are incurred after the relevant period of any possible reliance concluded. There is no evidence that the outcome in the Hazelton Administration would have been any different had these losses

been funded by Air New Zealand loans as opposed to the sources from which they have been funded. Indeed, the evidence is that Mr Humphris did not draw down on loan funds which were available to him (see page 8 of the Memo for the Creditors Meeting dated 29 April 2002 which is exhibit **BJF-14** to the affidavit of Bradley Fowler sworn 13 March 2002).

4.10 Further, an attempt to quantify Hazelton's entitlement to the $150M fund by reference to trading losses was expressly considered and rejected in the judgment handed down on 29 April 2002 (see paragraph 21 of same).

4.11 Thus, as to the comparative valuation of the claims of the Ansett and Hazelton groups, it is the defendants' submission that:

(a) the three Ansett addressee companies had good claims of real and substantial value under the Letter of Comfort;

(b) otherwise the claims of the entire group of 43 companies (the 40 Ansett companies plus the three Hazelton companies) cannot on the evidence be assessed as having any substantial value. On the evidence their only value was the elimination of potential dispute and the elimination of risk, or what is sometimes called "nuisance value".

4.12 An approach that merely distributed the fund to the Hazelton companies based on some calculation of the relative size or proportion of those companies' businesses or liabilities as a fraction of the entire group would

ignore the fact that not all group companies have claims of equal worth. It is the defendants' submission that any distribution of the fund must be weighted to reflect the fact that the three Ansett addressee companies had considerably stronger claims than any of the other 40 companies in the entire group.

4.13 In their Original Submissions at paragraphs 10.1 and 10.2 the defendants noted that by various measures the Hazelton businesses formed about 1.5% of the total Ansett group enterprises. This figure is commensurable with the most realistic of the various ratios set out at paragraph 19 of the judgment dated 29 April 2002 (ranging from 1.737 to 1.932%).

4.14 Bearing these matters in mind the defendants submit that the correct way for the $150M fund to be distributed is as follows:

(a) the vast majority of the payment of the $150M, at least 90% in the defendants' submission, should be attributed to the settlement of the substantial claims that the three Ansett addressee had under the Letter of Comfort;

(b) the remainder of the settlement sum should then be allocated amongst each of the companies in the entire Group as representing a payment in settlement of the nuisance value claims each of them had.

4.15 Applying a figure of 90% for 4.13(a) above and a figure at the upper end of the range for the relative proportion the Hazelton companies formed of the entire group of say 1.9% for 4.13(b) above, then the entitlement of the three Hazelton companies would be 1.9% multiplied by $15M or $285,000.

S P WHELAN

S SHARPLEY

Owen Dixon Chambers West

5 May 2003