

TRANSCRIPT OF PROCEEDINGS

O/N 13892

FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GOLDBERG J

No VID 621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED

MELBOURNE

9.37 AM, FRIDAY, 31 MARCH 2006

DAY ONE

MR S. SHARPLEY appears for the applicants

MR M.A. TROIANI appears for the National Australia Bank Ltd

MR T. LUXTON appears for ASIC

MS F. MURPHY-PALMER appears for WTH Pty Ltd

MR J. BORENSTEIN appears for the ACTU and Unions

MR J. GINNANE SC with MR S. GARDINER appears for the Commonwealth of Australia

MR B. WATKINS appears for the CBA and BNP Paribas

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MR S. SHARPLEY: Your Honour, I appear on behalf of the applicants.

HIS HONOUR: Mr Sharpley.

5 MR J. GINNANE SC: If your Honour pleases, I appear with my learned friend, MR S. GARDINER for the Commonwealth of Australia.

HIS HONOUR: Thank you, Mr Ginnane.

10 MR M.A. TROIANI: Your Honour, I appear on behalf of National Australia Bank.

HIS HONOUR: Yes, thank you. Thank you, Mr Troiani.

15 MR B. WATKINS: If your Honour pleases, I haven't filled out an appearance slip and will do so. I appear on behalf of the CBA and BNP Paribas.

HIS HONOUR: Yes. Yes, thank you.

20 MR J. BORENSTEIN: If the Court pleases, I appear for the ACTU and the unions.

HIS HONOUR: Yes, thank you, Mr Borenstein.

MR T. LUXTON: If it pleases the Court, I appear for the Australian Securities and Investments Commission.

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HIS HONOUR: Thank you. Yes, Mr Luxton. Yes, Mr Sharpley.

MR SHARPLEY: Your Honour, could I hand up a draft form of order? It has been handed up apparently.

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HIS HONOUR: Yes, I have read Mr King's affidavit, and I think I understand the amendments.

35 MR SHARPLEY: Yes, your Honour. As we have read paragraph 133 and 134 of your judgment, dealing with the AAE compromise - - -

HIS HONOUR: Yes.

40 MR SHARPLEY: - - - the upshot of your Honour's judgment appeared to us to be that your Honour approved the AAE compromise, noted the two explicit preconditions; one of which is satisfied by your Honour's approval, and the second would be satisfied after the holding of a 445F meeting for AAE, at which the creditors vote to pool AAE into AAL. But, your Honour noted a difficulty with
45 implementation of the settlement, in that the following of those steps and the pooling of AAE into AAL that the payment out by AAL of the 27 million on the drafting couldn't occur until all the other Ansett entities had pooled into AAL.

HIS HONOUR: Well, that was the interpretation I had put on it.

MR SHARPLEY: Yes.

5 HIS HONOUR: I got the impression from some of the observations when I published my reasons for judgment that either that wasn't intended, or the parties thought I was probably wrong.

10 MR SHARPLEY: Well, it certainly wasn't intended, your Honour. And, in order to remove that hurdle, an amending deed, which is exhibit to Mr King's affidavit, has been executed. And, if your Honour has reviewed that, I will just - the effect of - - -

HIS HONOUR: Basically, it provides so long as you get one pool company, so long as you get AAE into AAL, the deed can operate.

15 MR SHARPLEY: Yes, yes.

20 HIS HONOUR: Yes, well, it was interesting. When I was preparing my reasons, I had originally contemplated saying there is no point in approving the deed, because it is not going to be able to be implemented. And then, I reflected on that conceptually, and decided that my reasoning in 133 and 134 and your swear was more conceptually correct.

25 MR SHARPLEY: The upshot of those amendments, your Honour, is that any linkage between the operation of the compromised deed and the pooling of any other Ansett company has been well and truly severed. So, on the basis that the AAE compromise is a good deal for the creditors of AAE, regardless of whether any other company pools, and your Honour has approved it on the basis that it is a good compromise, the deed as amended, or the steps that would be followed on the assumption your Honour approves the deed is amended, is that the administrators
30 will now call a 445F meeting in the next couple of weeks for AAE, propose a form of deed which has been provided after the hearing - we provided a form of DOCA for AAE.

35 The creditors will vote. Given that the banks hold a majority in number, and well and truly a majority in value, and that they are committed to voting for pooling, AAE will pool into AAL, and then the deed provides for the payments out by the administrators of AAL from the assets of AAL which will have been added to by the 38 million, which will move from AAE into AAL on pooling.

40 HIS HONOUR: Yes, I follow that.

MR SHARPLEY: So, the next result of that - - -

45 HIS HONOUR: So, that means that irrespective of how - I forget at the moment what votes the administrators would have at the meeting of AAE, but it doesn't matter, does it?

MR SHARPLEY: It doesn't matter. The administrators are not asking for your Honour to approve them exercising their vote in any particular way, because they are not proposing - they obviously have a conflict when it comes to AAE, as with the other companies.

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HIS HONOUR: So, in AAE, they probably won't vote.

MR SHARPLEY: They won't vote.

10 HIS HONOUR: But, they won't vote.

MR SHARPLEY: They won't vote.

15 HIS HONOUR: But, there will be a sufficient weight of votes too for the resolution to be passed.

MR SHARPLEY: Yes, your Honour.

20 HIS HONOUR: Yes, well, that solves that problem.

MR SHARPLEY: Yes. So, that is one of the 41 companies and entities you dealt with.

25 HIS HONOUR: I hope we don't have 40 directions hearings to go. There won't be much left of the 38 million.

30 MR SHARPLEY: Well, every little is a gain, your Honour. What the administrators have provided for in their orders is the filing of further affidavit material by 12 May. And, your Honour, the administrators intend to take up your Honour's invitation to produce further material dealing with other issues arising in the judgment. And, those are the questions of what has been called erosion of costs in the six asset bearing companies, the question of notification of creditors, and also the question of what should be done with the trust assets held by 501. It is the administrators' intention to file a further affidavit dealing with those matters.

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We then contemplate having a directions hearing after that has been filed, at which your Honour could make directions for any party you wanted to respond to that, or for the setting down of a hearing to deal with that further material.

40 HIS HONOUR: Yes.

45 MR SHARPLEY: As we read your Honour's judgment, your Honour, in respect of the 34 companies that have no assets, your Honour seems disposed to allow - to give the directions allowing the administrators to vote in favour of pooling of those 34. The real issue is - - -

HIS HONOUR: Well, as I understood the material before me, in respect of those, I think it is 34 companies or thereabouts, if you look at a before and after situation, there is no evidence that there are any creditors who are significantly disadvantaged.

5 MR SHARPLEY: Yes, there are four companies and two trusts who are the asset holding companies - - -

HIS HONOUR: The asset holding companies.

10 MR SHARPLEY: - - - who may run the risk of being worse off, depending on the extent to which the costs of non-pooling erode their returns, which is the matter we will address in the further affidavit. But, in respect of the 34, there is no detriment to those creditors, because the companies have no assets, and thus could only be worse off if those companies weren't to pool. We would reduce from zero to bearing some
15 share of costs of non-pooling. So, the process the administrators are envisaging is firstly dealing with AAE - - -

HIS HONOUR: Yes.

20 MR SHARPLEY: - - - filing affidavit material, coming back for a further hearing at which we will be - to date, the orders haven't distinguished between the 34 and the six. We just ask for an order to be allowed to vote in all of the Ansett companies. We anticipate we will split the 34, so that your Honour can deal with those. And
25 then, in respect of the six, we will have to consider the position of each of those individually, based on what the further affidavit material shows about the effect of cost erosion on them individually. And, we will also need to consider the position of - the trust assets held by 501. So, that is the rationale behind orders numbers 3 and 4.

30 Yes, the solicitor reminds me there is a blank date in paragraph number 4, which we imagine should be sufficiently after 12 May, to allow the various interested parties to digest, and your Honour to digest the further affidavit material, and come to some conclusion as to how they - if they wish to respond to it, how they might.

HIS HONOUR: Well, how would Friday, 26 May, suit the parties?

35 MR SHARPLEY: Yes, thank you, your Honour. In respect of order number 5, the rationale behind this order is that if your Honour makes orders 1 and 2 that that is effectively the end of the role of the banks in this application. And, I understand from - they don't propose to appear or participate any further in the application. And,
40 as necessary and interested parties, the administrators have agreed to - this is the form of order your Honour has made in the past dealing with parties appearing at directions hearings.

HIS HONOUR: Yes, I follow that.

45 MR SHARPLEY: So, that is the rationale for why their costs of the application should be paid, because they in effect bow out at this stage of the proceeding. I

understand my learned friend, Mr Ginnane, wants to make an application relating the Commonwealth's costs of the application so far.

HIS HONOUR: Yes, I will deal with that as it - - -

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MR SHARPLEY: Yes.

HIS HONOUR: So, that is the form of order you are proposing today?

10 MR SHARPLEY: Yes, your Honour.

HIS HONOUR: Yes, that is fine. Mr Luxton, that is the case. Nothing to say? Where is Mr Luxton?

15 MR LUXTON: Your Honour, my instructions are that ASIC doesn't oppose the approval of the amendments to the deed.

HIS HONOUR: Yes, thank you. Mr Watkins, you are BNP Paribas.

20 MR WATKINS: Yes, your Honour, and CBA Bank.

HIS HONOUR: And CBA. You don't oppose the order, or you consent to the order? Which is it?

25 MR WATKINS: We consent to the order.

HIS HONOUR: Yes, of course. Mr Troiani?

30 MR TROIANI: Yes, your Honour. I am for the National Australia Bank, and just confirming, your Honour, that the amending deed has in fact been formally exchanged. So, that document is in play now between the parties and the National supports the orders that have been proposed by Mr Sharpley.

35 HIS HONOUR: Yes, thank you for that. Who else is there? Ms Murray-Palmer, have you got anything to say about this matter?

MS MURRAY-PALMER: No, your Honour. We support the orders.

40 HIS HONOUR: No. Thank you. Mr Borenstein?

MR BORENSTEIN: Don't oppose, your Honour.

HIS HONOUR: You wanted to say something about costs, Mr Ginnane?

45 MR GINNANE: Yes, your Honour.

HIS HONOUR: You have got no objection to the order about the deed?

MR GINNANE: No, we don't oppose it, your Honour. We wondered, in the reference in paragraph 1 to deed administrators, whether that was in reference to the deed administrators who were parties to - in respect of the companies that were parties to the AAE pooling compromise deed, or all the deed administrators, and
5 thought there was some ambiguity about that. But, perhaps that could be clarified. But, the other matter is, your Honour, that in respect of paragraph 5, the Commonwealth stands in a position somewhat similar to the banks in respect of the application for approval of the AAE pooling deed, because it is one of the five creditors of AAE; the other creditors being the three banks which are departing with
10 their costs, and another company, AEF, which I think is one of the Ansett subsidiaries.

But, of all the parties before your Honour, in relation to AAE, three are the banks, one is AEF and one is the Commonwealth. The Commonwealth has had a discrete
15 exercise, separate from its general involvement in the administration, of considering this AAE deed of pooling, the compromise proposal in it, how it affects the Commonwealth, and in the last week, has had costs incurred in considering the effect of the proposed amended deed, as we might call it. So, it is submitted that those costs, the Commonwealth's costs, that I might describe as being of and incidental to
20 the application for the approval of the AAE pooling deed, be costs in the administration. We then pick up the words at paragraphs 5:

In the administrations of the companies of which the plaintiffs are deed administrators.

25 The nub of the application for costs, your Honour, is that the Commonwealth, as distinct from a number of other parties, is one of the limited number of creditors of AAE, and therefore has a - - -

30 HIS HONOUR: I understand the role.

MR GINNANE: The Commonwealth obviously has an ongoing role in respect of the administration of other companies, but has had - - -

35 HIS HONOUR: Yes, but the Commonwealth, as I understood it, had a particular - I think it was through the ATO, wasn't it - - -

MR GINNANE: Through the ATO for, I think, \$3.5 million, your Honour.

40 HIS HONOUR: Yes.

MR GINNANE: So, that is why that order for costs, which we would seek in terms of the Commonwealth's costs of and incidental to the application for approval of the AAE pooling deed, be costs in the administrations of the companies of which the
45 plaintiffs are deed administrators. They are the two matters we wanted to raise, your Honour.

HIS HONOUR: If I were not to make the order, you would be getting your costs out of the application in any event though, wouldn't you?

5 MR GINNANE: In due course, one assumes that those costs would be part of the administration, your Honour, yes.

HIS HONOUR: So, all you are really wanting is to accelerate them. Is that it?

10 MR GINNANE: Well, to - - -

HIS HONOUR: Or, accelerate some of them?

15 MR GINNANE: - - - I suppose, your Honour, to bookmark these costs which have been incurred in respect of a discrete part of the case, and seek an order for them at this point. Yes.

HIS HONOUR: The Commonwealth has an ongoing role though in the rest of the matter as well.

20 MR GINNANE: It does. Yes, your Honour.

HIS HONOUR: Would it be sufficient for your purposes for me to note, or to state, or for it to be identified that insofar as the Commonwealth incurred costs, in relation to the approval of the AAE pooling compromise deed, those costs should be picked up in due course in a final order made for the disposition of the matter.

30 MR GINNANE: Well, your Honour, one always seeks orders for costs at the time they have been incurred. We hear what your Honour has said, but the instructions are to seek the order in the terms.

HIS HONOUR: Yes, I follow that.

MR GINNANE: If your Honour pleases.

35 HIS HONOUR: Mr Sharpley?

40 MR SHARPLEY: I should note, your Honour, the reports - the administrators have no problem with an order in the form of order number 5 being made in favour of the Commonwealth at the end of the application. As I noted, the only reason why the costs of the banks are being dealt with today is because they are effectively dropping out. Now, as I understand what my learned friend, as your Honour put it, is asking for is really an instalment order on part of the Commonwealth's costs of the entire application; those being the costs to date on the AAE part of the application.

45 HIS HONOUR: Well, I understand. I don't think it is put on the basis there is any urgency for the Commonwealth to get the costs so they can balance the budget, for example.

MR SHARPLEY: No, no, they seem to be well and truly in the black from what I hear, your Honour.

5 HIS HONOUR: Yes, I believe so. Look, I am not sure that is evidence properly before me.

MR SHARPLEY: Your Honour, as I said, we haven't got a problem with the concept of paying the Commonwealth's costs at the end of the application, including obviously the costs of the AAE part of it.

10 HIS HONOUR: I think my present view is that if I am treating this like an interlocutory matter, there is no point or there is no need for the costs to be, as it were, taxed and paid forthwith under order 60, whatever it is.

15 MR SHARPLEY: Exactly, your Honour. And, it would just involve an administrative burden for us and the Commonwealth in going through the costs that have been incurred to date, and splitting out the ones that relate to AAE orders, as opposed to the other 10 or 12 issues that the Commonwealth - - -

20 HIS HONOUR: I think in terms of efficiency of administration of the provisions in relation to costs, the parties who are no longer going to participate in the proceedings should get their final orders for costs, so they can go away and their final positions can be determined. Insofar as there are parties such as the Commonwealth who have a continuing role in the case, I am disposed to make a formal order, as it were for
25 interlocutory costs, or part of the costs to date, like Mr Ginnane has sought on instructions. But, I wish to make it clear that in due course, the Commonwealth's costs should properly include any costs incurred of and incidental to the approval of the AAE pooling compromise deed - - -

30 MR SHARPLEY: Yes.

HIS HONOUR: - - - any costs brought as a result of the publication of my, what I will call loosely, interim reasons for judgment.

35 MR SHARPLEY: Yes.

HIS HONOUR: Is that sufficient for your purpose?

40 MR SHARPLEY: Yes, your Honour. As long as the Commonwealth's entitlement to costs of course is, as my learned friend framed his order, the cost of the application for approval of the AAE compromise deed.

HIS HONOUR: Yes, but then - - -

45 MR SHARPLEY: It is legal costs of this proceeding that we are discussing here, not the Commonwealth's administrative costs in otherwise dealing with the administrators or - - -

HIS HONOUR: No, but in due course, if you look at the start of the proceeding, you might have to, if I was to make a separate order for costs, compartmentalise or consider apportioning early costs. For example, counsels' pre-fee on an earlier hearing - - -

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MR SHARPLEY: Yes.

HIS HONOUR: - - - how much of that is to be attributed to the AAE pooling compromise deed, and how much is to be attributed to looking after the interests, for example, of the SISA scheme.

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MR SHARPLEY: Yes, your Honour.

HIS HONOUR: So, I think in terms of efficiency, unless there is any urgency which hasn't been indicated, the continuing parties' costs should be picked up at the end. But, as I said, I note as a matter of record that those costs should include the costs incurred by the Commonwealth in considering the aspect of the AAE pooling compromise deed approval brought about by my reasons for judgment.

15

MR SHARPLEY: Thank you, your Honour.

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MR GINNANE: If your Honour pleases.

HIS HONOUR: Anything further from any of the parties? Well, I will make the orders in the terms of the minutes which have been handed to me, in terms of paragraph 1, paragraph 2. The point that Mr Ginnane raises in relation to the deed - it really is, isn't it, in the second last line of paragraph 1, Mr Sharpley, the deed administrators of AAE, is it not?

25

MR SHARPLEY: Well, your Honour, there are a number - if your Honour looks at the AAE pooling compromise deed - - -

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HIS HONOUR: Yes, I have had.

MR SHARPLEY: - - - there are a number of - the administrators in their personal capacity are the first and second applicants. And then, there are one, two, three, four, five, six, seven, eight companies of which they are deed administrator, and two trusts of which they are deed administrator and also have a role as agents of the trustee.

35

HIS HONOUR: Oh, I see. So, yes, of course. So, it is not just - - -

40

MR SHARPLEY: They are wearing more hats than their AAE hat, when it comes to executing this compromise. They are wearing, perhaps, 11 of their 40 hats. It arises from the fact that the NAB has a variety of claims under guarantees and indemnities.

45

HIS HONOUR: Claims, yes, I follow that.

MR SHARPLEY: So, technically, it will be the administrators wearing their 11 hats, rather than their 40 hats - who are the deed administrators referred to in the second last line - who give effect to the AAE pooling deed, because they are the parties to it. And, as wearing their AAL hat, they perform it.

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HIS HONOUR: Just bear with me for one moment. It seems to me probably the best way to do it is to say in the second last line of paragraph 1, and that each of the administrators of the companies which are parties to the AAE pooling deed.

10 MR SHARPLEY: Your Honour, perhaps if I - the difficulty with that is that they are also parties in their personal capacity. If I could suggest instead, your Honour - - -

HIS HONOUR: Is that right?

15 MR SHARPLEY: Pardon? Mr Troiani is helpfully suggesting that the form of wording could be, each of the deed administrators, in the capacities in which they have executed the AAE pooling compromise deed.

HIS HONOUR: That is Solomon-like.

20

MR SHARPLEY: Yes. The definition is AAE pooling deed, which it compromises the original deed as amended.

HIS HONOUR: Any further advance on Mr Troiani's suggestion?

25

MR GINNANE: A similar change to paragraph 2, your Honour, line 3.

HIS HONOUR: Yes, of course. Yes, well, I will make the orders as amended in paragraphs 1 and 2, and the orders in paragraphs 3, 4, inserting 26 May, and paragraphs 5 and 6.

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MR SHARPLEY: Thank you, your Honour.

HIS HONOUR: Anything further from the bar table?

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MR TROIANI: If your Honour could just excuse National Bank from further appearance in this application.

HIS HONOUR: And any of the other parties? The same goes for the other parties, for you, Mr Watkins - - -

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MR WATKINS: Thank you, your Honour.

HIS HONOUR: - - - and anyone else who wishes to not participate further. Adjourn the Court.

45

MATTER ADJOURNED at 10.03 am INDEFINITELY