AUSCRIPT AUSTRALASIA PTY LTD

ABN 72 110 028 825

Level 4, 179 Queen St MELBOURNE Vic 3000
(GPO Box 1114 MELBOURNE Vic 3001)
Tel:(03) 9672-5608 Fax:(03) 9670-8883

TRANSCRIPT OF PROCEEDINGS

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FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GOLDBERG J

No VID 621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED

MELBOURNE

9.32 AM, WEDNESDAY, 22 MARCH 2006

DAY ONE

MR S. SHARPLEY appears for the applicants
MS F. MURRAY-PALMER appears for the Contradictor WTH Pty Limited
MR T. LUXTON appears for Australian Securities and Investments Commission
MR B. WATKINS appears for the Respondent CBA and BNP Paribas
MR R. McCLURE appears for the Commonwealth of Australia

HIS HONOUR: In this matter the deed administrators of the various companies in the Ansett Group sought directions in relation to the manner in which they may vote at proposed meetings of creditors of the companies in the Ansett Group to approve the pooling of the assets and liabilities of the companies in Ansett Australia Limited. They have also sought directions in relation to the approval and giving effect to a deed of compromise between Ansett Aviation Equipment Proprietary Limited and three of its major creditors, and they have sought directions in relation to the manner of the notification to creditors of the proposed meetings to consider pooling; that is to allow them to give notice of the meetings to creditors by posting notices of the meetings on the Ansett websites and by publishing such notices in daily newspapers.

I have reached the conclusion that I am not disposed to give the deed administrators the direction that they wish in relation to voting at the proposed meetings. I have reached the conclusion I should approve the deed of compromise, and I have reached the conclusion that the manner of notification to creditors of the proposed meetings should not be solely by reference to websites. And I publish my reasons. I will hand the reasons out, and then I will direct the parties' attention to certain paragraphs.

My reasons are somewhat extensive but the basic conclusion I have reached in relation to the voting is that by giving the administrators the power to vote in favour of pooling, they are acting adversely to the interests of the creditors whom they represent in, what has been called loosely, the asset owning companies and there is an effect on both priority and non-priority creditors. I have dealt in the reasons for judgment separately in relation to, what I will call loosely and generically, the Pelican and the Westsky trusts. If you go to page 29, paragraph 82, you will see that I say that looking at the matter solely in the interests of the beneficiaries under each trust, I cannot see any basis upon which it would be appropriate or proper to give the administrators the directions they seek.

In substance, the direction seeks approval for the administrators to enter into a transaction and effect a distribution of the funds otherwise than in the interests of the beneficiaries. And then I expand on that analysis.

If I could then turn to paragraph 86 on page 31, the fourth line: notwithstanding the breadth of the definition of the expression expedient in section 63 of the Trustee Act, I do not consider that it is expedient in the interests of the trust properties or the beneficiaries under the trusts of the administrators be given the power to put a resolution and vote in favour of it adversely to the interests of the beneficiaries.

If I could then turn to page 41, paragraph 120, I am not satisfied that the circumstances involved in the administration of the companies in the Ansett Group, and in particular the asset owning companies, are such that it is appropriate that the administrators be given a direction that they may vote at a meeting of creditors of those companies in favour of the exceptional situation of pooling all the assets and liabilities of all the companies and trusts in the Ansett Group into one company. And I summarise my reasons thereafter for reaching this conclusion, although earlier in the reasons I explain why I have reached that conclusion.

Speaking very generally - and my reasons are to be found in the published reasons for judgment but I am seeking to summarise so the parties understand generally the position I have reached - I did not see the matter of a balancing exercise between the overall creditors of the group as against the disadvantage to particular creditors by the pooling proposal or voting in favour of the pooling proposal. The reasons identify what was in the evidence of a number of creditors, both priority and non-priority creditors, who would be disadvantaged by the pooling proposal.

I should perhaps direct the parties' attention to two further paragraphs in my reasons for judgment. Paragraphs 128 and 129, which I shall read, on page 43:

> *If the administrators could establish with a greater degree of precision the extent of the extra costs involved in the administration of each of the asset owning companies and trusts if there is no pooling there would be a better opportunity to assess whether it is likely in a no pooling situation that the extra costs of administration would erode the amount the creditors of those companies would receive in a no pooling situation. If such a conclusion were to be reached, then it might be said that pooling would benefit all creditors because, at the end of the day, all creditors are advantaged by the savings in the extra costs of administration and no creditor is disadvantaged. The creditors who otherwise might have become entitled to a greater distribution would have had the extent of that distribution eroded or eliminated by the extra administration costs that would have been incurred in a no pooling situation.*
>
> *At the present time the evidence is insufficient to enable me to reach that conclusion. If further evidence is available in relation to this issue, I would be disposed to give the matter further consideration.*

The parties will find between pages 17 and 22 an analysis of the evidence which demonstrates the relative advantages and disadvantages of a number of creditors in what are called the asset owning holding companies, depending upon pooling or no pooling.

I propose at this stage simply to publish my reasons for judgment and to adjourn the further hearing of the matter, subject to what the parties may say in terms of timing, to Thursday, 30 March, for the purpose of deciding and hearing submissions as to what further steps should be taken in the matter, whether by way of directions, orders or otherwise. As I have said and I identify in paragraph 133 of the judgment on page 44, I am disposed to approve of what I have called the AAE pooling compromise deed. Perhaps I should read paragraph 133:

> *I am disposed to approve of that deed on the basis that it provides benefits and advantages for AAE and for its creditors generally which would not be otherwise - which would not -*

that first "be" should not be there -

which would not otherwise be obtainable. The advantages of AAE entering into the deed is supported by confidential legal advice given to the administrators which I have read. The operation of the deed is expressed to be conditional upon, first, the approval or non-objection to the deed by the Court in this proceeding and, secondly, the pooling of the assets of AAE into AAL. The first condition is satisfied by my approval of it. The satisfaction of the second condition must await the outcome of the meeting of creditors of AAE.

However, I would - for a full appreciation of the conclusions which I have come to, I would commend the parties to read the reasons in full.

Mr Sharpley, it seems to me that what needs to be done, there needs to be detailed consideration given to my reasons. I can't just summarise the whole of the reasoning in one or two paragraphs. It is quite extensive. What do you say as to my proposal that the matter be adjourned at the moment to Thursday, 30 March or some other convenient date to the parties so that they can have the opportunity to consider my reasons, obtain instructions, and then decide where the matter is to go after that?

MR SHARPLEY: I have noticed your Honour has invited the parties to consider whether further material should be submitted on a number of points.

HIS HONOUR: I have indeed.

MR SHARPLEY: And I don't know whether that is only likely to be done if the deed administrators come to the conclusion that they can - it is possible to provide further material. Whether they will be in a position to know that by Thursday week, I don't know, but if we set Thursday as a directions hearing - - -

HIS HONOUR: Let me say this to you so you understand, and I am sorry it took me so long to publish my reasons. After the matter was reserved and I entered into a detailed consideration of the matter, I came across a number of matters that hadn't been necessarily the subject of close detailed analysis which probably wasn't thought necessary and might not have been adverted to at the time. I had the choice of bringing the parties back and saying: hey, what about this or what about that - and I speak colloquially, of course.

MR SHARPLEY: Yes.

HIS HONOUR: But then as the matter progressed and a number of matters came to my attention, I thought it best to publish reasons on the basis of the material before me and the conclusions I had reached, leaving the door open if possible for further consideration of the matter. The matter was not an easy one to determine. Speaking again very generally, when one looks globally at the group, one can reach one conclusion; but when you look at the rights that individual creditors, both priority and non-priority creditors, have in relation to the particular companies in respect of which they are creditors, I reached the conclusion one could not just disregard those

rights on the basis of necessarily an overall benefit to other people, having regard to the relevant provisions of legislation and trust law and corporations law.

MR SHARPLEY: Yes.

HIS HONOUR: And it may well be that on a further consideration of my reasons, different aspects of the evidence can be the subject of different focus, if I can put it that way.

MR SHARPLEY: Yes.

HIS HONOUR: In other words, I am not ultimately shutting the door to the matter. What I am demonstrating is on the present - on my analysis of the material, I am unable as a matter of principle to reach the conclusion in favour of the directions which were sought by the administrators, but that is not to say that the matter cannot necessarily be revisited. I could deal with the matter in one of two ways: I can leave the matter open for further directions, which I am presently minded to do; or if you thought that I have erred in my reasoning, I could pronounce a final order and you could take the matter further by way of appeal if you wish to do so.

MR SHARPLEY: Yes.

HIS HONOUR: I think probably the former proposal is probably more practical - - -

MR SHARPLEY: Well, certainly not with having had - not having yet had the ability to consider these reasons in detail, your Honour, I - - -

HIS HONOUR: Well, of course you have got to consider - of course you have got to consider the reasons.

MR SHARPLEY: Having glanced at them, my impression is that the sticking point with the substantial order is that your Honour wasn't convinced that in a non-pooling situation the return to the creditors in the asset holding companies would necessarily be completely extinguished.

HIS HONOUR: That is right.

MR SHARPLEY: Albeit that the 90 or 95 per cent of them - we are talking about a third of the cent in the dollar but there are - - -

HIS HONOUR: No, you are absolutely right about that, and part of the problem was this. If you - in the analysis, in the primary analysis which was undertaken, if you go to page - if you look at page 16, for example, paragraph 52 - - -

MR SHARPLEY: Yes.

HIS HONOUR: - - - you will see:

In arriving at these estimates to which I have already referred, the administrators have made a number of assumptions and taken into account a number of matters which are relevant for consideration.

And look at (b) in particular:

(b) Estimated final net realisations assume that pooling occurs and the AAE pooling compromise deed is given effect to.

MR SHARPLEY: Yes.

HIS HONOUR: And a comparison that the administrators gave me in a pooling and non-pooling situation was pooling with the AAE compromise deed - - -

MR SHARPLEY: Yes.

HIS HONOUR: - - - and then non-pooling with the AAE compromise deed.

MR SHARPLEY: Yes.

HIS HONOUR: I have reached the conclusion - and I think I am right - that if you are going to look at a non-pooling situation, you have to look at it without the AAE compromise deed. The reason I say that is if you look at paragraph 134 on page 44 of my reasons for judgment, you will see I refer to the two conditions precedent in paragraph 133 that have to be satisfied. One is my approval of the deed, which I have done. Secondly, the pooling of the assets and liabilities of AAE into AAL. But as I read the deed, if only that occurs but pooling of the other companies doesn't occur, there is no room for the compromised deed to be carried into effect. And I explain that for a second time in paragraph 134. However, as I read the deed, it is not intended to operate or be carried into effect unless the assets of all the companies and trusts in the Ansett Group are pooled into AAL.

MR SHARPLEY: Yes.

HIS HONOUR: So much follows from clause 3 of the deed which provides for payment to the bank creditors to be made from the "pooled assets" which are defined in clause 1.1 as:

...the assets of the Ansett Group of companies is pooled into AAL by way of pooling.

So as I read the deed - and this wasn't the subject of any argument at all - I don't think the matter was fully appreciated at the time, certainly I didn't appreciate it - that if in a no - if you are going to look at a pooling and no pooling situation and compare them, no pooling must exclude the operation of the AAE compromise deed.

MR SHARPLEY: Yes. I am not sure, your Honour, that is intended - that is how the AAE deed is intended to operate because from the point of view of the creditors

of the Ansett Group, the pooling, the administrator's position is that the AAE compromise deed is very much in their interests in that it - - -

HIS HONOUR: Interests of?

MR SHARPLEY: Of all creditors of the - - -

HIS HONOUR: Of all companies?

MR SHARPLEY: Well, yes, because if the AAE compromise deed does not occur, then I think the figure is about 3 to 5 million will flow into AAL from AAE, and the rest will be distributed to the creditors of AAE which are the banks and the tax office and the Commonwealth. If the - and the only - and so you have 3 to 5 million flows into AAL via AAL proving in the administration of AAE on inter-company debt - - -

HIS HONOUR: Yes, but is it your understanding that if the - if the AAE pooling deed, pooling compromise deed is approved, and there is a meeting of AAE creditors and the AAE creditors vote in favour of pooling, but all the other companies don't, the pooling compromise deed is to be carried into effect?

MR SHARPLEY: Just a moment, your Honour. Yes, that was my understanding, your Honour, that - - -

HIS HONOUR: Well, in that - - -

MR SHARPLEY: Whether that needs to be made more clear in that deed by way of - - -

HIS HONOUR: Well, you see, the reason is - the reason I say that is when I read the deed and I looked at the provision in clause 3.1 that provided what was to happen - - -

MR SHARPLEY: Yes.

HIS HONOUR: - - - once the money was paid over - I think it is $38 million I think it is.

MR SHARPLEY: Yes.

HIS HONOUR: Then the three bank creditors are to be paid out of what are defined in the agreement as the pooled assets.

MR SHARPLEY: Yes, but that is not necessarily - the pooled assets are not necessarily the result of the pooling of the entire group because - - -

HIS HONOUR: But, you see, that is the definition. If you look at the top of page 45 I extract the definition of pooled assets as the assets of the Ansett Group of companies as pooled into AAL by way of pooling.

MR SHARPLEY: Well, your Honour - - -

HIS HONOUR: Now, if I have misread it - - -

MR SHARPLEY: Yes.

HIS HONOUR: - - - by all means take me on appeal. I say that - I withdraw that comment. That the matter can be corrected further.

MR SHARPLEY: Yes.

HIS HONOUR: But if I am right in that interpretation, maybe the deed needs to be amended.

MR SHARPLEY: Well, it was - yes, your Honour. It was certainly the intention, as I understand it, that the - because a pooling of AAE - the AAE compromise deed is in the interests of Ansett Group regardless of whether other companies pool or not - - -

HIS HONOUR: I agree with that.

MR SHARPLEY: - - - because it - the effect of it is that an extra 6 to 8 million flow into AAL for the benefit of the AAL creditors, and assuming some or all other Ansett Group companies don't pool, those who have inter-company debts with AAL might get some share of that to distribute to their own creditors via proving in AAL.

HIS HONOUR: I understand all of that.

MR SHARPLEY: So whether the - I think the definition, or certainly the intention of the definition was that the pooled assets are such assets of the group which, by reason of the 445 - they had meetings and amendments to the DOCAs - actually do end up in AAL, taking into account that it is quite possible that the voting in some entities may not have that result and there may only be a partial pooling.

HIS HONOUR: I see. So you say clause 1.1 means the assets of such of the Ansett Group of companies as may be pooled into AAL by way of pooling but not necessarily all of them.

MR SHARPLEY: Well, it is those that are - it is those assets which are actually pooled into AAL. Because the administrators - - -

HIS HONOUR: Yes. Well, this is perhaps a debate we can have later on.

MR SHARPLEY: Yes.

HIS HONOUR: And I think the advantage of me - or my proposal to publish my reasons at this stage and then invite further directions is probably a sensible one.

MR SHARPLEY: Yes. That particular point may be - to the extent the clause is ambiguous, and your Honour has found that it has a particular meaning, it may be a problem that can be rectified by amendment to the deed and asking your Honour to consider the amended deed.

HIS HONOUR: I understand.

MR SHARPLEY: In terms of the - - -

HIS HONOUR: Well, you see it may make a significant difference to the figures.

MR SHARPLEY: Yes. Insofar as the Ansett administrators' scenarios assumed that AAE pooling would be approved, it was not on the basis that the AAE compromise deed would be approved. I think it was on the basis that that transaction was not dependent on every other - or any other particular non AAL company being pooled into AAL, that that transaction would go ahead provided the Court gave approval to the commercial sense of that transactions in its own right and that the only pre-conditions to it are - I think they are listed in paragraph 133.

HIS HONOUR: Yes, you are right about that. Yes, well, as I said, I - when I looked at the deed as a whole and came across the definition of pooled assets, as I said, I have recited that in paragraph 134.

MR SHARPLEY: Yes.

HIS HONOUR: This is one of the matters on which perhaps I might have got the parties back one morning and said, what does this mean, what do you say? But then a number of other matters accumulated and that is why I concluded the better thing to do was to put everything into a reasoned judgment, not to make any orders, and then for you to come back and say you can fix this up, you can fix that up, I have got this wrong, I have got that wrong.

MR SHARPLEY: Yes. In terms of the substantive - leaving aside the AAE pooling deed, the substantive objection - or the substantive sticking point, if I might term it that, your Honour, is that the administrators while they can give an estimate of the additional costs of pooling can't demonstrate that non-pooling will necessarily completely extinguish the claims of the creditors in what are called the asset holding companies. So while it is the administrators - it has been the administrators' submission that certainly when it comes to the creditors, the 95 per cent plus who are likely to recover a third of the cent in the dollar, that those amounts would be very quickly extinguished. Your Honour has invited the administrators in paragraph 128 to consider whether they can establish with a greater degree of precision the costs of a non-pooling scenario.

HIS HONOUR: You see, it varied from 9 to 24 million.

MR SHARPLEY: Yes. Well, the - - -

HIS HONOUR: And that is sufficiently broad - I am not being critical - it is sufficiently broad to be of little value, you see, in determining whether what was ultimately - what ultimately might be eroded. If you look, for example, at page 20 of my reasons for judgment, if you look at - or perhaps page 21, paragraph 62:

> *If there is no pooling, the administrators say the following creditors are better off than they would be if there was pooling.*

And you get (a) through (i).

MR SHARPLEY: Yes, prior to the additional costs of non-pooling being - - -

HIS HONOUR: Well, I understand that. But the difficulty - my concern was, if you looked at the - a number of the third party non-priority creditors, if you look, for example, at the Pelican trust, there is an average receipt of almost $11,000.

MR SHARPLEY: Yes.

HIS HONOUR: And in Kendell in (e) it is an average receipt of $4000, in (c) Ansett International it is an average receipt of some $7800. And then if you look at (g), (h) and (i) over on page 22 the priority creditors of Show Group get an extra $10,000. Now, on a scale of things, $10,000 in a billion dollars is very much de minimis, but when looking at the rights of individual creditors, looking at the rights of particularly the employees, $10,000 to an individual employee is a not - if I can use a double negative, a not insubstantial sum.

MR SHARPLEY: Yes.

HIS HONOUR: And that is what concerned me. I reached a conclusion, looking at the authorities and as a matter of principle, it wasn't necessarily a matter, leaving aside the cost of administration of saying 31,000 employees will be better off and there will be maybe 80 or 90 employees who will be worse off and, therefore, you balance that out, I didn't see it as a balancing exercise when you are looking at a situation of rights consequent upon an administration or a liquidation of a company. And you will find that I have referred to some American authorities as well as a range of Australian authorities which seem to support that principle. I couldn't find any authorities, any statement of principle which basically said - or which basically approved a pooling situation where a number of creditors were disadvantaged by the pooling proposal.

MR SHARPLEY: I noticed, your Honour, it says in paragraph 128:

> *If the administrators could establish...*

Page 43:

> *If the administrators could establish with a greater degree of precision the extent of the extra costs involved in the administration of each of the asset owning companies and trusts, if there is no pooling, there would be a better*

opportunity to assess whether it is likely in a no pooling situation that the extra costs of administration would erode the amount the creditors of those companies would receive in a no pooling situation.

HIS HONOUR: Yes. I don't think the evidence goes that far at this stage.

MR SHARPLEY: Well, the administrators have - certainly on the material available to the time the affidavits were sworn, their best estimate as your Honour has said was a range, because it is obviously dependent on a large number of contingencies and - - -

HIS HONOUR: But, you see, that is the global range as well.

MR SHARPLEY: Yes.

HIS HONOUR: And that is part of the difficulty. Look, for example, at the Pelican Trust, page 21 paragraph 62. If there is no pooling, leaving aside the question of the administration costs at the moment, 79 third party non-priority creditors or claimants of the Pelican Trust will receive approximately $860,000 representing a likely distribution of 99.19 cents in the dollar. That is an average receipt of $10,886.08. Now, take two extreme situations, if there is real - if the administration of the Pelican Trust hereafter is nominal so there is hardly any moneys at all, that average receipt might come down, even on a broad brush basis, to say $9000. However, if the administration costs are such that it erodes 9 or 10 thousand dollars of that figure, then I might be disposed to reach a different conclusion.

MR SHARPLEY: When your Honour refers to "erode the amount" do you mean - - -

HIS HONOUR: Eliminate.

MR SHARPLEY: - - - erode to zero or - - -

HIS HONOUR: Well, I am going to keep my options open on that. Where do you draw the line? I am not disposed in advance to draw the line arbitrarily. Obviously take two extremes, if that $10,886.08 was only reduced to $10,800 I might reach one conclusion. If it was - if the $10,886 was reduced to $700, I might reach another conclusion.

MR SHARPLEY: Yes. There was a - the administrators did include in the material a table which identified in respect of the asset holding companies which I think of the 12 or 15 issues, group issues, applied to each. And without having the benefit before me, my recollection is that a majority of the issues applied to at least each of the companies. There was no - there were none which stood as - to one side as being, you know, almost disentangled from the remainder of the group. They all had at least half a dozen issues into the group. Now - - -

HIS HONOUR: I remember reading that evidence at the time. I have dealt - I think there is some passage - - -

MR SHARPLEY: Yes, there is a - I noted this morning it was referred to in our submissions which I was - - -

HIS HONOUR: I don't have it in front of me at the moment but there was material that said these are the - most of the companies will be affected by one or other of these particular aspects of administration.

MR SHARPLEY: Yes. There is certainly a table somewhere in the material that identifies which of the issues - yes, your Honour has referred to the - paragraph 70 my instructor points me to.

HIS HONOUR: Paragraph 70 of my reasons?

MR SHARPLEY: Yes.

HIS HONOUR: Yes, that is right:

> *All the asset holding companies in AAHL with some exceptions are directly affected.*

MR SHARPLEY: Yes, there is a table which is table which is exhibited to one of the affidavits which I think has probably led your Honour to - - -

HIS HONOUR: Well, I don't need to trouble you this morning about that.

MR SHARPLEY: No.

HIS HONOUR: But it may well be if that can be tightened up - - -

MR SHARPLEY: Yes.

HIS HONOUR: - - - a much better approximation can be given.

MR SHARPLEY: Well, your Honour - - -

HIS HONOUR: The material, as I read it during my consideration of the matter,, I wasn't able to reach a conclusion as to the relative erosion or elimination of the surplus that would occur in a non-pooling - - -

MR SHARPLEY: By attributing the global costs to each of those companies which - where the creditors may be better off if there is no pooling.

HIS HONOUR: You see, the difficulty is where you have got a large group or a group of companies and the creditors don't look at the group as being the source of their - the repayment of the debt or their payment of the liability to them so you are

looking at individual companies, I don't consider you can disregard the corporate structure and say, forget about the fact that there is 30 companies, this is just one group. The American authorities, and I think the Australian authorities, approach it on the basis that if people look to the group as a whole and thought they were employed by the group as a whole or the group as a whole was liable for the debt, then you have got this sufficient intermingling or intertwining to not worry about the corporate structure. The Americans call it substantive consolidation.

So that where you have got separate companies and separate assets and separate liabilities, if you are going to have the administration continue, you have got to be able to say if you can, well, of the 24 million you would expect that those costs would be incurred in part by these companies and my best estimate of those is that it would eliminate any return to the creditors or reduce it to such an extent that because money has a time value, the time value of - - -

MR SHARPLEY: The eventual distribution.

HIS HONOUR: - - - of having an earlier distribution more than outweighs the extra amount they might get four years down the track. Now, the problem was when I looked at the material, I couldn't determine any of those figures. It may well be that I overlooked it. It may well be I wasn't directed to it. It may well be that it needs to be more refined.

MR SHARPLEY: Yes.

HIS HONOUR: I think the answer is probably the latter, rather than the first of - - -

MR SHARPLEY: I think the affidavit material goes so far as to identify the issues that would need to - which would involve additional expenditures either by the administrators in administrative costs by their staff, or our best estimate of the costs of coming to court on a variety of matters and seeking directions; for example, as to the ownership of the headquarters.

HIS HONOUR: Yes, but that wasn't - no attempt was made - maybe it can't be. I would be surprised, but no attempt was made to say, for example, in relation to the Pelican Trust or to Kendall it would be expected that the extra costs to be apportioned to that company overall would be of the order of $5 million. I am not asking, and can't ask - it would be quite improper for it to be done - for the administrators just to pluck a figure out the air that conveniently fits bringing the figures back to zero.

MR SHARPLEY: No.

HIS HONOUR: But I would have thought they have sufficient material available to them to make a reasoned, informed estimate based on the advice they are given that the probability is.

MR SHARPLEY: Yes.

HIS HONOUR: My difficulty was the material wasn't there for me to say, well, it is a global figure, that is good enough. I wasn't disposed to do that because that would be inappropriate as a matter of principle.

MR SHARPLEY: Well, the administrators have been able to identify their global estimates, obviously within a wide range of dealing with particular issues, and they can identify which of the asset holding companies are implicated in each issue - I mean, which of the overall group - - -

HIS HONOUR: I understand that.

MR SHARPLEY: Whether there is any - if, for example, issue number 6 the estimate is $5 million and there are 20 companies implicated, whether there is any basis to attribute costs other than one twentieth of $5 million each, I don't know.

HIS HONOUR: Well, it may well be that is the best way of doing it because the nature of the costs is such that they would be incurred commonly for each company.

MR SHARPLEY: Yes.

HIS HONOUR: I didn't have that material available to me.

MR SHARPLEY: Yes, my instructor has just given me a copy of the relevant page from the affidavit which includes that table. And what the deponent said was that trying to estimate costs on a company by company basis would be impracticable or impossible. Now, obviously that is a matter we will have to confront directly as to whether - - -

HIS HONOUR: Well, I remember that - - -

MR SHARPLEY: - - - which category it falls into.

HIS HONOUR: Well, I remember that evidence being given. It may well be that on further consideration - I am not sure why it is impractical, and I am not sure why it is impossible. If you know the general nature of the expense, you would say, well, it would be certainly a minimum of - because a particular amount of work would have to be done, and the lawyers and the accountants would be able to say that involves a minimum of, no less than for each particular company, X thousand, X hundred thousand, X million dollars. But I understand exactly what you are saying.

MR SHARPLEY: Yes.

HIS HONOUR: And, as I said, I am prepared to give the administrators the opportunity to reflect upon the material in the light of my reasons, and to come back and say there is further material, or you have got something wrong and I want to explain why, or you overlooked something and I want to explain why, and I am prepared to reconsider it. for example, let me - just bear with me for one moment. If

you look at paragraphs 113 - paragraphs 112 on page 39, you will see I address the issue of what I will call general equity, the third line on 112:

> *The administrators submitted that a primary consideration for them is to exercise their vote in the interests of the creditors as a whole. They submitted in substance that because the Ansett Group was administered as a group, often without regard to which precise company should incur a liability or the basis or terms upon which one company made an asset available to another company, the group's creditors should be considered and treated as a whole. That proposition has an initial attraction as it provides for an element of equity and equality across the whole spectrum of Asset employees, priority creditors and financial institutions and trade creditors. However, the evidence does not support the proposition that all the employees, financial institutions and trade creditors regard themselves as working for, dealing with, or having rights against the Ansett Group as a whole, rather than being in a relationship with a particular Ansett Group company. Particularly is this so in relation to the 84 employees who are likely to be disadvantaged by the pooling proposal for which the administrators want to cast an affirmative vote.*
>
> *I have not lost sight of the fact that the pooling proposal by the administrators is sensible and advantageous to most of the creditors from a practical point of view. I am mindful of the observations of Young J in re Charter where his Honour said, "So long as there is a power under the Corporations law or otherwise available to the Court, the Court is anxious to see that liquidations are conducted with commercial efficiency and will not allow any technical rules to frustrate that attempt."*
>
> *However, I do not see my concern about a rejection to the pooling proposal based on its disadvantageous consequences for a number of priority creditors, in particular, as a matter of applying a technical rule of insolvency.*

In other words, I focused on the disadvantageous consequence in particular of the 84 employees, but there are some other non-priority creditors identified in that list earlier to which I have referred.

Rather than - I am happy to continue the debate with you but I think you have exposed and uncovered the issues which did concern me and which underlie the reasons for the conclusions I have reached. Probably the best thing to do is to enable - is simply to do one of two things: either adjourn the matter for further directions next week, or you indicate that you want to come back with further material. Probably the former is preferable because you would need to put the other parties on notice of what you want to do.

I should also say this, that the fact that there was no objection to the pooling proposal or the voting on a pooling proposal other than through the medium of the contradictor, was a matter that didn't shift the balance in my mind because the

particular creditors particularly affected, especially the 84 priority creditors, as I understood it hadn't been put on particular notice that they would be affected by the pooling proposal. You may recall Mr King in one of his exhibits exhibited the list of the creditors of $10,000 or more who had been given a specific letter about the proposal.

MR SHARPLEY: Yes.

HIS HONOUR: But my understanding is that didn't include, for example, the 11 priority creditors, the Show Group, who will lose an average of about $10,000 per creditor. Now, I don't know whether - - -

MR SHARPLEY: My understanding, your Honour, was that all creditors who stood to lose 10,000 on these estimates or more received a letter, regardless of their priority or non-priority status. So if - and I am told by my instructor that there were three of the 84 that were in the 10,000 plus category. But it is true, in respect of creditors who stood to lose less than 10,000 there was no distinction drawn by the administrators between priority - - -

HIS HONOUR: Yes, well I - - -

MR SHARPLEY: - - - and non-priority creditors in terms of whether they wrote them a letter or not.

HIS HONOUR: Yes. Well, I understand that. So that is a matter that could perhaps be addressed later if need be.

MR SHARPLEY: Yes.

HIS HONOUR: Why don't I simply, subject to what anything further you or anyone else may say, adjourn the matter for further directions on Thursday, the 30th, if that is convenient to you and other parties at the bar table at 9.30 for further directions or on any other - - -

MR SHARPLEY: My instructor who has the principal carriage of this matter has a particular difficulty with that day in that he, in fact, is due to attend court as a witness so he is asking - - -

HIS HONOUR: Well, I wouldn't want to be in contempt of another court in the country.

MR SHARPLEY: He is asking me whether perhaps 3 or 4 April, or even Friday, 31 March - - -

HIS HONOUR: I would prefer Friday, 31 March, if I could.

MR SHARPLEY: Yes.

HIS HONOUR: The following week on Tuesday I am starting a two week hearing in my capacity as President of the Competition Tribunal on the Telstra pricing matter that will take up one or two weeks, and I would prefer not to interfere with that initially, though I may have to if there is further hearings in this matter.

MR SHARPLEY: Friday would be suitable. Thank you, your Honour.

HIS HONOUR: Friday, the 31st, would be satisfactory to you at 9.30?

MR SHARPLEY: Yes.

HIS HONOUR: Do any of the other parties at the bar table wish to say anything further about the matters that have passed between Mr Sharpley and myself or in relation to the reasons I have handed down, or as to the proposal that this matter simply be adjourned to Friday, 31 March at 9.30?

MR LUXTON: No, your Honour.

MR McCLURE: Not at this time, your Honour.

HIS HONOUR: No. Thank you very much. Well, I will simply order at the moment that the further hearing of the application for directions be adjourned to Friday, 31 March at 9.30. If it be necessary to reserve costs, I do so although I don't think it is. Anything further, Mr Sharpley?

MR SHARPLEY: No, your Honour.

HIS HONOUR: Thank you for attendance. Adjourn the Court.

MATTER ADJOURNED at 10.23 am UNTIL FRIDAY, 31 MARCH 2006