

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE**

**COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL LIST**

No. 2115/01 F5382

**BETWEEN:**

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY  
LTD (ACN 065 590 178) (as Trustee of the ANSETT GROUND STAFF  
SUPERANNUATION PLAN) & Ors**

Plaintiffs

and

**ANSETT AUSTRALIA LTD  
(ADMINISTRATORS APPOINTED) (ACN 004 209 410) & Ors**

Defendants

**SLB 9**

---

<b>Date of Document:</b>	6 February 2002
<b>Filed on behalf of:</b>	The Plaintiffs
<b>Prepared by:</b>	Solicitor's Code: 564
Maurice Blackburn Cashman	Tel: 9605.2700
Lawyers	DX: 466
Level 10, 456 Lonsdale Street	Ref: SLB
Melbourne Vic. 3000	

---

This is the document marked SLB 9 now produced and shown to Simone Louise Bingham at the time of affirming this Affidavit this 6th day of February, 2002.

Before me:

*Anne Gooley*  
.....  
**ANNE GOOLEY**  
of 456 Lonsdale Street, Melbourne  
a natural person who is a current  
practitioner within the meaning  
of the Legal Practice Act, 1996.



**SPARK AND CANNON**

Telephone:

Adelaide	(08) 8212-3699
Melbourne	(03) 9670-6989
Perth	(08) 9325-4577
Sydney	(02) 9211-4077

**TRANSCRIPT  
OF PROCEEDINGS**

---

**FEDERAL COURT OF AUSTRALIA**

**VICTORIA DISTRICT REGISTRY**

**GOLDBERG J**

**DIRECTIONS**

**IN THE MATTER OF ANSETT AUSTRALIA LTD ACN 004 209 410  
ADMINISTRATORS APPOINTED - MARK FRANCIS MENTHA  
(PLAINTIFF)**

**MELBOURNE**

**10.30 AM, FRIDAY, 1 FEBRUARY 2002**

**MR S.P. WHELAN, with MR T. WALKER (instructed by Arnold Bloch  
Leibler) appeared on behalf of the applicants**

**MR J. BEACH QC, with MR D. STAR (instructed by Maurice Blackburn  
Cashman) appeared on behalf of the respondents**

HIS HONOUR: Mr Whelan, I wonder if you can assist me in this respect. There was some suggestion a day or so ago there might be some further applications brought before the court in some urgent matters.

5 MR WHELAN: Yes.

HIS HONOUR: Is anything anticipated in the immediate future?

MR WHELAN: Yes. Your Honour is always one step ahead of me.

10 HIS HONOUR: That would surprise me.

MR WHELAN: Well, two steps.

15 HIS HONOUR: That's not what I had in mind, I should say.

MR WHELAN: Your Honour, Kenny J, last Wednesday, had the application returnable before her that your Honour had indicated your Honour ought not to hear, for approval of a sale of what's referred to as the Ansett mainline business to Tesna Holdings Pty Ltd which is a company associated with Mr Fox and Mr Lew. That application did not proceed as it had become apparent on the Tuesday, and had been announced at the creditors meetings on the Tuesday, that the conditions precedent provided for by the contract which had to be satisfied by 31 January, that's Thursday, so meeting is Tuesday, Kenny J, Wednesday, and the deadline so as to speak was Thursday, were not going to be met principally because requisite consents and agreements had not been reached with various third parties.

20  
25  
30  
35  
40  
The position which was explained to the creditors was that the administrators' commercial judgment was that the negotiations ought to continue. If I can use the colloquial expression, the Tesna sale ought to be pursued for a further period of time - they suggested up to one month - notwithstanding the risk that that involved being the incurring of trading losses during that period. In essence on the Tuesday, I think it's fair to characterise the creditors as having endorsed that course of conduct by reference to the resolution that was passed. The position is though, your Honour, that the administrators are now in fairly perilous waters. The contract with Tesna has been extended, and is being extended.

40 HIS HONOUR: You mean the date for settlement?

MR WHELAN: Yes, in short periods, but the objective being worked on at the moment is to make a new agreement with the new timetable by midnight on Sunday. I say, your Honour, that - - -

HIS HONOUR: That's Sunday, two days' time?

5 MR WHELAN: Two days' time. I say that the administrators perceive  
themselves to be in somewhat perilous waters because they are confident that  
they will incur trading losses over any further period prior to settlement as  
February is not a good trading month. So they will be in a position of  
10 assuming certain trading losses in pursuit of the uncertain Tesna sale which has  
not settled by the agreed date on one occasion. They assess that risk as being  
one which is warranted by the considerable or additional advantages of the  
Tesna sale compared to the alternatives but they will be seeking a direction on  
Tuesday, we anticipate, assuming an agreement is reached from Sunday, there's  
15 consultation with the committees of creditors on Monday, and we would be  
seeking a direction on Tuesday that it is appropriate in the circumstances for  
the administrators to proceed in the manner outlined. That would be an - - -

HIS HONOUR: When you say "proceed in the manner outlined"?

20 MR WHELAN: That it is appropriate for them to continue conducting the  
mainline business notwithstanding the likelihood of losses in order to keep  
alive the sale transaction with Tesna.

HIS HONOUR: But why do they need to apply to the court in that respect?

25 MR WHELAN: Because, your Honour - well, I'll have to take your Honour to  
the - although it's in a sense a commercial decision it's a commercial decision  
which has become of sufficient difficulty for the administrators to be warranted  
in our submission in seeking a direction from the court endorsing what they're  
30 doing.

HIS HONOUR: But they had that commercial decision to make last  
September or October.

MR WHELAN: They did, that's true.

35 HIS HONOUR: I forget when the airline - - -

MR WHELAN: November. Yes, that's - - -

40 HIS HONOUR: November when the - was it Ansett Kick Start? I forget the  
(indistinct) that was used.

MR WHELAN: Yes, Ansett Kick Start began in September and the sale to  
Tesna was in early November. Your Honour is right, that they had that

commercial decision then. The administrators though are of the view that the situation is different now and has become more difficult, more controversial, and has become a situation where there is now an inherent possibility that should the sale not eventually be consummated they might be subject to criticism; the situation being now that the deadline agreed has already been missed and they know that February is a month where losses will be incurred.

HIS HONOUR: But what's the alternative?

MR WHELAN: The alternative is to shut - well, I don't know. There are a number of alternatives I suppose but one of them would be to cease operations and avoid incurring the losses.

HIS HONOUR: Because these are matters that will have to be considered in any application before the court.

MR WHELAN: That's so, your Honour.

HIS HONOUR: If they ceased operation would that have a consequence in relation to the sale to Tesna?

MR WHELAN: Yes, it does, because the sale to Tesna is a sale as a going concern and it's fundamental to the requirements of the purchaser that the airline not cease trading.

HIS HONOUR: Does that then mean that if the airline ceased trading the deal with Tesna might not go on?

MR WHELAN: Certainly the administrator's commercial judgment at the moment is that the pursuit of the Tesna sale necessitate their continued trading and this will be set out obviously in material. Your Honour is right to identify the fact that in many ways this is a commercial judgment and the administrators have not previously sought the court's directions in relation to commercial judgments of this kind about the sale but our submission will be that there comes a point where one cannot really expect administrators who are professional accountants to make this kind of very difficult decision which is inherently likely to be subjected to criticism with the wisdom of hindsight if it should transpire that the sale is not consummated but the losses are still incurred. We would submit, your Honour, that on the authorities it's appropriate for the court to give the administrators the reassurance of a direction that they are proceeding in an appropriate manner.

HIS HONOUR: But the obverse side of that is you're asking the court to get involved in commercial considerations.

MR WHELAN: And sometimes the court does that when it's warranted, and this is such an occasion, we would submit. I mean, the alternative is that the court might say, "Well, no, it's entirely a decision for you. I won't enter into that area because it's entirely for you and it's entirely a commercial decision." Well, the administrators would then have to make their decision in the light of that circumstance.

HIS HONOUR: You see, this matter has come before me on earlier occasions but in a different framework. Air New Zealand \$150 million, for example, it was dependent upon the court approving a transaction which the court in a sense was, whether willingly or unwillingly drawn into that commercial consideration, and that matter was dealt with.

MR WHELAN: There were legal issues there too.

HIS HONOUR: That's right.

MR WHELAN: But there was also the issue which does arise now which is if an administrator - and we would say the cases bear this out - where an insolvency officer is placed in a position where he or she considers that the imperatives of the moment involve adopting a course which is out of the ordinary or unusual for an insolvency administrator to adopt such as in the MOU case, settling claims that had not been investigated; that it's appropriate to seek a direction. Here, the administrators perceive they have entered the unusual territory of continuing to conduct a business which they have been conducting for quite a long time now within a solvency administration context.

HIS HONOUR: At a loss?

MR WHELAN: Well, we now are faced - we know that in fact we - - -

HIS HONOUR: When I say "at a loss", I ask that as a question mark and not making a statement.

MR WHELAN: Sometimes losses, sometimes not, but we know that in the period over which we are going to conduct these negotiations we know that during February we're going to sustain losses. We are very confident of that. So we have the certainty of losses on the trading, trading and insolvent company in the course of an insolvent administration, in order to obtain a sale as a going concern, and the administrators perceive that course to be sufficiently unusual to avail themselves of the capacity to bring the facts to the court and ask whether what they're doing is appropriate. Their commercial judgment is that it is appropriate. The creditors have been advised of the

position in the meetings although it was a matter which had only arisen shortly before the meetings, and the administrators would seek the court's - or the reassurance of a direction that should it transpire that they traded on through February and incur losses and the fixed cost, together with the trading losses are approximately \$6 million per week, so that they incur losses over a period of, say, four weeks and the sale doesn't consummate which has already happened once, that those with the wisdom of hindsight might not then be in a position to make allegations against them.

10 HIS HONOUR: That really involves a balancing exercise at this stage, I suppose.

MR WHELAN: Yes.

15 HIS HONOUR: The incurring of a \$6 million a week losses presumably will reduce pro tanto the amount available for distribution.

MR WHELAN: That's so, obviously.

20 HIS HONOUR: I am just trying to think it through.

MR WHELAN: Yes.

25 HIS HONOUR: Whereas as against that if they don't continue and they - I'm speaking loosely for the moment - stop trading which means the airline stops flying, that either may or will bring about an inability to sell the mainline business - - -

MR WHELAN: That's right your Honour.

30 HIS HONOUR: - - - which will reduce pro tanto even more presumably the amount available for distribution.

35 MR WHELAN: Yes. These things are of course in a sense imponderable. There can't be - but their concern is that in retrospect the certainty of the loss compared to the uncertainty of the sale may appear differently to the way it appears in the heat of the moment now which is when they have to make the decision. It's that circumstance which a court officer finds themselves in which we submit is appropriate for the officer to come to the court and say, "Well, here's the decision I'm going to make. Is it appropriate?" Of course, it doesn't preclude anybody saying later, "They didn't tell you the whole story," or, "There were other factors which were not set out."

HIS HONOUR: The cases say that so long as the full disclosure, there's

protection.

5 MR WHELAN: Yes. So that this application will be an advisory one in the most traditional sense and we wouldn't be proposing to serve anyone other than consultation with our committees of creditors which we can't really do until Monday in the expectation that we will have something to consult with them about consequent upon reaching an agreement on Sunday or by the end of Sunday.

10 HIS HONOUR: Mr Whelan, one of the matters which has concerned me from time to time - and it has been in the nature of the applications - is to have the benefit of, as it were, a devil's advocate.

15 MR WHELAN: Yes.

HIS HONOUR: I have raised that from time to time and it has been dealt with in one way or another. It may be appropriate in this circumstance to identify a creditor whose costs of course would come out of the administration to come to court to at least - maybe to represent the committee of creditors and for him, her or it to retain someone fairly immediately to advise on these very issues.

20 MR WHELAN: Yes.

HIS HONOUR: It's not for me to say or do anything at the moment because there's nothing before the court.

25 MR WHELAN: Yes.

30 HIS HONOUR: But if it's a matter of an urgent application and those sort of issues arise it would be helpful to have someone, as it were, ready to go rather than to adjourn the matter further for a day or so.

35 MR WHELAN: Does your Honour have in mind having someone who can say, "Well, we have looked at it independently," or - sorry for interrogating your Honour about this, or the more traditional situation of engaging someone with the specific brief of putting the contrary view if I have made that clear.

40 HIS HONOUR: I think what I'm seeking is some sort of hybrid probably; someone to put the contrary view is the traditional way it was done in equity.

MR WHELAN: Yes.

HIS HONOUR: Whether that's appropriate to do in relation to matters that arise in administrations under Part 5.3A, I haven't thought through.

MR WHELAN: Yes.

5 HIS HONOUR: I would leave that matter open for the moment. I think it requires a little bit of flexibility to deal with the exigencies as they arise but that's something that I think you could take on board and get an appropriate creditor to get advice on that very issue.

10 MR WHELAN: Yes. The creditors who are in a sense most obviously at risk by the incurring of trading losses are the priority creditors in the sense that - - -

HIS HONOUR: That's Mr Beach and Mr Star's clients?

15 MR WHELAN: Yes, and the Commonwealth government as Mr Zwier, as a kind of quasi priority creditor. On the one hand one might expect they would be well qualified to bring forward any concerns as to the course proposed but on the other the fact of the matter is that Mr Beach's clients support the course proposed so that - - -

20 HIS HONOUR: I understand that. There is sometimes a misunderstanding. A person who puts the contrary view may not necessarily benefit from the contrary view.

25 MR WHELAN: Yes. I think perhaps your Honour's concern might best be met if representatives, presumably Mr Beach, of the employees, were to be served with the material; they being specifically requested to address their minds to the very real possibility that it will be their creditors who will bear the consequences of a failure to consummate an agreement in February, they being the first in a sense to be vulnerable to an adverse outcome as a consequence of  
30 further losses. It would be unrealistic for them to actually submit, unless they changed their minds, that that course shouldn't be pursued because their various representatives spoke in favour of it at the meeting on Tuesday and I know from instructions, or I'm told that they do support the course that's  
35 proposed, but they are very well placed to alert your Honour to all of the risks and concerns that would be raised, or that are raised, by the continuation of trading during this further period.

40 HIS HONOUR: I understand Mr Beach's position and I might ask him in a moment if he wishes to say anything about that issue.

MR WHELAN: He probably knows nothing about it, your Honour, in the sense that all of this would be - - -

HIS HONOUR: And he would need to get instructions of course.

MR WHELAN: There was no notice of this matter being canvassed this morning; no notice that that has been given to Mr Beach.

5 HIS HONOUR: What I will - well, it's not for me to direct you to do anything at this stage because there's nothing before the court.

MR WHELAN: No.

10 HIS HONOUR: But what I'm trying to do is facilitate an expeditious disposition of an urgent matter. These are only tentative and suggestive views at the moment.

MR WHELAN: Yes.

15 HIS HONOUR: If you're proposing any such application Mr Beach's client should be put on notice immediately, both formally and informally.

MR WHELAN: Yes.

20 HIS HONOUR: They should be served with the material. I think you should also do the same with the committee of creditors and all I can say at the moment is I would probably be greatly assisted, not only by hearing from Mr Beach's clients on the issue, but also hearing from and having a particular  
25 non-priority creditor address the issues which you're going to raise.

MR WHELAN: Yes, your Honour.

30 HIS HONOUR: And for that person to have had the benefit of legal advice and to be represented on Tuesday.

MR WHELAN: Yes, your Honour.

35 HIS HONOUR: I don't know that I can say anything more at this stage.

MR WHELAN: Your Honour, we will post the transcript of this discussion this morning on the web site, and including the foreshadowed application on Tuesday, so that creditors who are following the administration - it may be  
40 there are some who wish to make submissions.

HIS HONOUR: Yes. Insofar as you may need leave to do that with the transcript, I grant it.

MR WHELAN: Thank you, your Honour. We will take steps in the light of

that exchange of views.

HIS HONOUR: Well, thank you.

5 MR WHELAN: I'm sorry, your Honour, the final thing was we did raise with  
Kenny J whether we shouldn't be making this what was then foreshadowed  
application to her and she - - -

10 HIS HONOUR: I'll discuss the matter with her as to hears the matter. I'll  
leave further consideration.

15 MR WHELAN: Yes, Your Honour. I'm sorry, your Honour. Your Honour,  
my instructors reminded me that we also did advise Kenny J that there may be  
agreements reached with third parties with whom it's necessary to make  
agreements in order to bring this sale to a successful conclusion. It appears to  
us to be likely that there will be aspects of those agreements which we're likely  
to wish to have directions made in relation to of an approval kind, if I can call  
it that, hopefully not actually approval again but directions having the same  
effect because - well, for various reasons. So I just - - -

20 HIS HONOUR: Those matters are more probably insuperably tied up with the  
application that's part heard before Kenny J, I suppose.

25 MR WHELAN: Yes, that's right, your Honour, and I alerted Kenny J to that.

30 HIS HONOUR: Yes. She mentioned that to me. I have had discussions with  
Kenny J about these issues and she and I have agreed that for the moment it's  
appropriate to continue the line of communication through my associate with  
any urgent applications. To the extent to which it's appropriate I will continue  
to deal with them. To the extent to which it's not appropriate Kenny J will hear  
them.

MR WHELAN: Thank you, your Honour.

35 HIS HONOUR: Mr Beach, do you wish to be heard on any aspect of what has  
been said this morning?

40 MR BEACH: Your Honour, so far as my clients are concerned we have taken  
the position of analysing very carefully and probing the position of the  
administrator and any information that it supplied and we will continue to do  
that task, and we can continue to do that in relation to this application that has  
been foreshadowed, but it's one thing to say that we'll probe and test the  
material. It's another thing to say that we'll submit that your Honour shouldn't  
make the orders sought by the administrators because, as Mr Whelan has

correctly pointed out, our position at the moment is non-opposition to what the administrators are suggesting. So we can undertake the role of probing and testing. Perhaps we could cross-examine some of the deponents of any of the administrators' affidavits but I can't see us as presently instructed putting the devil's advocate position to your Honour.

HIS HONOUR: No, I understand that, because your position has always been to support a sale because it's a sale that enhances the return to your clients.

MR BEACH: Putting it another way, it's the lesser of two evils in this present context. In other words, short-term losses is a better outcome than a huge loss if the airline has to shut and the sale can't be completed.

HIS HONOUR: Yes, I understand.

MR BEACH: Your Honour, in terms of the timing, I'm going to be interstate next Tuesday. Now, that doesn't obviously dictate either the court's calendar or what the administrator does, but if it's though to be of importance that similar representation appear to test this material, I would like perhaps Thursday as the return date for the application but - - -

HIS HONOUR: I think there is probably a problem because of the issues which give rise to the administrators wanting the approval as soon as possible.

MR BEACH: I can understand that.

HIS HONOUR: I guess in an ideal world Mr Whelan might stand up now and say, "While I'm here, your Honour, can I have the approval?"

MR BEACH: Yes

HIS HONOUR: But it can't be done that way of course. Whether it needs to be done even tomorrow or on Sunday or Monday is a matter I can only leave for Mr Whelan. I have always been prepared to accommodate hearings for counsel who have been integrally involved for a long, long time but you're better discussing that with Mr Whelan rather than with me.

MR BEACH: I will certainly do so, your Honour.

HIS HONOUR: Yes. Thank you for that dialogue. Adjourn the court.

**MATTER ADJOURNED AT 10.50 AM ACCORDINGLY**

