

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

COMMERCIAL LIST - DIRECTIONS HEARING  
IN THE SUPREME COURT OF VICTORIA  
COURT 1 OLD HIGH COURT  
BEFORE THE HONOURABLE JUSTICE WARREN  
FRIDAY 23 DECEMBER 2002  
IN THE MATTER OF  
ANSETT AUSTRALIA LTD  
F5476

- - -

MR D. MACLEAN APPEARED ON BEHALF OF THE PLAINTIFF.  
MR D. WHELAN APPEARED ON BEHALF OF THE 1ST AND 2ND DEFENDANTS.  
MR COX APPEARED ON BEHALF OF THE 3RD DEFENDANT  
MR J. MERRALLS APPEARED ON BEHALF OF THE 4TH DEFENDANT

HER HONOUR: Mr Whelan, I think the ball is your court,  
following what was said by your instructor on Friday.

MR WHELAN: Yes, Your Honour, the position is that the amount  
which Your Honour's judgment can deal - the consequence in  
terms of the liability which Your Honour's judgment has  
addressed is of such a magnitude that it is presently a  
significant inhibition upon further dividends being paid.  
In those circumstances, the administrators feel compelled  
to seek such expedition as is consistent with prudence, in  
terms of orders being made. We ask that the court, which  
has already made, we appreciate, strenuous efforts beyond  
what's normally accorded to litigants, to have this matter  
dealt with and to have judgment delivered, we do ask that  
the indulgence continue in the sense that it is important  
that orders be made as soon as it's practical to do so.  
Now, the other parties need to consider what ought to be  
done and we recognise that. We have circulated a  
suggestion this morning as to the answers which ought to  
be made consequent upon Your Honour's reasons. If it's

1 not practical for the matter to be dealt with before 20  
2 January, we accept that, but we do make the submission  
3 that the interests of those concerned in the Ansett  
4 administration, which for present purposes is primarily  
5 the employees and the Commonwealth government - that  
6 expedition, so far as it's consistent with the parties  
7 having a proper opportunity to consider the matter, is  
8 what we would seek, Your Honour.

9 HER HONOUR: So what is it that you would contemplate happening  
10 today, Mr Whelan?

11 MR WHELAN: We'd contemplate, assuming that the other parties  
12 don't feel in a position to make submissions to Your  
13 Honour about what answers to the questions should be today  
14 - if they do, we would be in a position to do that and  
15 would seek to do that. If they say, "we simply haven't  
16 had time to look at the reasons and consider the  
17 ramifications", well, we accept that but we would ask Your  
18 Honour to set a date for the making of orders as early as  
19 is consistent with Your Honour's convenience and their  
20 treatment of the matter. I was told that a date 20  
21 January had been referred to, if - - -

22 HER HONOUR: The reason for the reference to 20 January, is it's  
23 the date when I return from leave, and I have a trial  
24 listed that day.

25 MR WHELAN: I see.

26 HER HONOUR: I certainly would be disposed to deal with this  
27 matter early on that morning.

28 MR WHELAN: Yes.

29 HER HONOUR: But if for any reason it needs to be dealt with  
30 more expeditiously, then I will hear what it is you or any  
31 other party has to say. There are ramifications that flow

1 from the fact that under Order 3, I think it is, of the  
2 Rules, time ceases to run, in terms of the holiday  
3 vacation period.

4 MR WHELAN: Yes, that's so.

5 HER HONOUR: That is a factor that may have to be taken into  
6 account.

7 MR WHELAN: Yes, time ceases to run tomorrow and doesn't  
8 commence again until after 9 January, under the Rules. So  
9 that's our position, we would like it dealt with as early  
10 as can practically be done and in that respect we're in  
11 the hands of the other parties, to some extent.

12 HER HONOUR: Yes, very well. Perhaps I'll hear what they have  
13 to say. Mr MacLean?

14 MR MacLEAN: Your Honour, as we see it, what we will need to do  
15 is study this very long judgment, prepare some draft  
16 answers in accordance with Your Honour's direction. We  
17 would imagine we would need to circulate our draft to all  
18 the other factions and, in an ideal world, reach a  
19 consensus as to what the orders should be, or there will  
20 have to be argument. So the idea that Your Honour can set  
21 a day to make the orders may not work. The best we can do  
22 is work as quickly as we can to do our job, and on our  
23 estimations, 20 January or a date close to that we think  
24 is not very realistic.

25 HER HONOUR: Why not?

26 MR MacLEAN: The complexity of the judgment, the need to  
27 consult the other parties, we'll need to talk to the  
28 actuary about what the effect of the judgment is on the  
29 fund. If I say it's a complex task, Your Honour, it is,  
30 and not one that can be done hastily at all.

31 HER HONOUR: I would have a concern if the trustee adopted what

1           might be described as an open-ended approach, that you go  
2           away and come back when you are ready. My experience  
3           tells me in other like cases sometimes trustees take a  
4           long time to come back.

5 MR MacLEAN: They do, Your Honour.

6 HER HONOUR: On the basis of the indications given by Mr Whelan  
7           this morning and by his instructing solicitor on Friday,  
8           that would seem to be undesirable in this particular case.

9 MR MacLEAN: Certainly, Your Honour, certainly.

10 HER HONOUR: Can you give me an indication as to when you  
11           believe the trustee would be in a position to circulate  
12           orders?

13 MR MacLEAN: Late January, Your Honour - could be earlier, but  
14           it depends upon the trustees' meeting, depends upon the  
15           lawyers reading the judgment, formulating the drafts,  
16           getting instructions on the drafts. Not a simple  
17           judgment, not a simple task, but - late-ish January, that  
18           would be the best I could confidently say.

19 HER HONOUR: One alternative that may be open to the trustee,  
20           and I emphasise "may", would be to circulate orders as to  
21           what might be described as the "core" or "key" questions  
22           and the other matters can be dealt with at a later time.  
23           My recollection is that Mr Santamaria seemed to  
24           contemplate that that might be the case, during the course  
25           of the trial. It may have just been a passing  
26           observation.

27 MR MacLEAN: I think it should be treated as a passing  
28           observation, Your Honour. On my quick reading of the  
29           judgment, we would have to get all the orders ready for  
30           Your Honour first.

31 HER HONOUR: Hence do I take it then from what you say, Mr

1 MacLean, that you do not expect that the trustee would be  
2 in a position to circulate orders and come back to the  
3 court before, say, 31 January?

4 MR MacLEAN: Well, that would give us ample time, Your Honour.  
5 We may be able to do it more quickly. The problem is we  
6 really don't know, but certainly we would do whatever we  
7 can as quickly as we can. The suggestion that we would  
8 also make, Your Honour, is that the other parties could  
9 speed up the process by doing the same thing, preparing  
10 their own drafts, letting us see them while we're doing  
11 the process ourselves, rather than the other parties  
12 waiting for us.

13 HER HONOUR: Yes. Is there anything else at this point, Mr  
14 MacLean?

15 MR MacLEAN: No, Your Honour.

16 HER HONOUR: Mr Cox?

17 MR COX: Your Honour, we'd be ready to argue the matter to the  
18 extent that it needs to be argued at any time convenient  
19 after 20 January.

20 HER HONOUR: Is there anything else?

21 MR COX: No, Your Honour.

22 HER HONOUR: Mr Merralls?

23 MR MERRALLS: We're in the same position, Your Honour. We  
24 heard what my learned friend Mr MacLean's said and agree  
25 with it and we would do all that we can to expedite the  
26 matter. We're conscious of the need for speed. We also  
27 have to obtain instructions, as Your Honour can  
28 appreciate.

29 HER HONOUR: Do I take it then Mr Merralls you would say I  
30 should not deal with the matter at this stage before 20  
31 January?

1 MR MERRALLS: Yes, Your Honour.

2 HER HONOUR: Is there anything else at this point, Mr Merralls?

3 MR MERRALLS: Yes, there are a couple of matters, Your Honour.

4 This is a very long judgment, as we appreciate, and

5 unfortunately typographical errors and other glitches

6 occur - - -

7 HER HONOUR: Perhaps they can be communicated to those services

8 - - -

9 MR MERRALLS: No, well, one of them is an important matter,

10 because it isn't just a typographical error, I fear. I'm

11 not sure whether Your Honour intended to use one word or

12 another. If Your Honour has a copy of the reasons for

13 judgment, perhaps I might take Your Honour briefly to it?

14 HER HONOUR: Which page, Mr Merralls?

15 MR MERRALLS: It's paragraph 373. It's in the middle of p.151.

16 HER HONOUR: Yes.

17 MR MERRALLS: Does Your Honour see a sentence beginning,

18 "Further, the obligations was", about halfway down?

19 HER HONOUR: Yes.

20 MR MERRALLS: Should the third word in the next line be

21 "provable"?

22 HER HONOUR: The third word in the next line?

23 MR MERRALLS: Yes, it appears as "probable". Either would make

24 grammatical sense, they could be sensible words, but we

25 thought that perhaps Your Honour intended to say

26 "provable"? The sense is quite different, between

27 provable and probable.

28 HER HONOUR: Yes, that may well be so, Mr Merralls. I have to

29 say that I'll need to read this in the paragraph.

30 MR MERRALLS: Yes.

31 HER HONOUR: Thank you for drawing that to my attention.

1 MR MERRALLS: And while I'm at it, may I draw Your Honour's  
2 attention to one other error which is an error of  
3 transcription but not a typographical error? It appears  
4 in paragraph 287.

5 HER HONOUR: Yes.

6 MR MERRALLS: At the foot of the page, there is a quotation  
7 from the judgment of Lord Hoffmann, whose name has been  
8 typographically misspelt throughout the judgment, from the  
9 Tushoko Finance case. Now, I make two comments about it,  
10 first of all the page reference to the case is not  
11 correct; secondly, the footnoted reference to the passage  
12 on the next page in 117 is not correct, it should be 682;  
13 thirdly, something seems to have gone wrong in the  
14 transcription with the passage and I'm unable to piece  
15 together what it should have been. I've looked at the - -  
16 -

17 HER HONOUR: All the matters can be attended to. Are there any  
18 other matters you wish to draw to my attention, Mr  
19 Merralls?

20 MR MERRALLS: No, Your Honour.

21 HER HONOUR: Thank you very much. Mr Whelan, you have heard  
22 what the other parties have had to say.

23 MR WHELAN: Could I ask Your Honour to adjourn the matter to  
24 the 20th? It may be that the matter is simpler than Mr  
25 MacLean fears, and hopefully it is, an order can be made  
26 that day. Otherwise, Mr MacLean can give a report as to  
27 how far the trustee has got and what impediments, if any,  
28 they're encountering. Our submission is we ought to be  
29 attempting to have orders made as quickly as we can.

30 HER HONOUR: Yes, if I adjourn the matter to 9.30 on 20 January,  
31 on the basis that I would have limited time available, as

1 I do have a trial due to start at 10.30 that morning,  
2 would that be convenient, Mr Whelan?  
3 MR WHELAN: Yes, Your Honour.  
4 HER HONOUR: Mr Merralls?  
5 MR MERRALLS: Yes, Your Honour.  
6 HER HONOUR: Mr MacLean?  
7 MR MacLEAN: Yes, Your Honour.  
8 HER HONOUR: Mr Cox?  
9 MR COX: Yes, Your Honour.  
10 HER HONOUR: Yes, very well. I'll adjourn this matter until 20  
11 January. I will also grant liberty to apply, in the event  
12 that something crops up.  
13 MR WHELAN: Thank you, Your Honour.  
14 HER HONOUR: Adjourn the court.  
15 - - -