



SPARK AND CANNON

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FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GOLDBERG J

MENTION

No V 3125 of 2002

MARK ANTHONY KORDA and OTHERS

and

CREDIT LYONNAIS (AS SECURITY AGENT) and ANOTHER

MELBOURNE

4.24 PM, FRIDAY, 19 JULY 2002

MR L. ZWIER (instructed by Arnold Bloch Leibler) appeared on behalf of the plaintiffs

MR J. WATERS appeared on behalf of the defendants

MR ZWIER: Your Honour, I appear on behalf of the plaintiffs in that application.

5 MR WATERS: Your Honour, I appear for the defendants, Credit Lyonnais and Deutsche Verkehrsbank.

HIS HONOUR: Thank you, Mr Waters. Mr Zwier, I brought the matter on as a matter of expedition, and I apologise for any inconvenience to the parties, but the matter was listed - as I understood, it was going to be listed for directions
10 on Monday. I got a communication from my associate that she's spoken to someone I think in your office about the matter, and it sounded as if the matter should be dealt with in open court because there seemed to be some potential urgency about the matter and we might need to make some other arrangements.

15 MR ZWIER: Your Honour, it was probably me that your associate spoke to and I did try to convey to the court that we were seeking to just list that matter on Monday in open court. It is probably more convenient to the parties to have done so this afternoon, and, your Honour, I thank you for that. Your Honour, this application relates to the sale of Kendell Airlines.

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HIS HONOUR: We haven't had Kendell Airlines before, have we?

MR ZWIER: No, Kendell has been remarkably quiet, relative to the other companies, your Honour. Kendell Airlines is a regional airline which is being
25 sold to Australia Wide Airlines together with Hazelton, your Honour. That sale is presently expected to complete next Wednesday.

HIS HONOUR: Who are the administrators of Kendell?

30 MR ZWIER: Mark Korda and Mark Mentha are the administrators.

HIS HONOUR: So they are part of the Ansett Group.

MR ZWIER: They are.

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HIS HONOUR: Presumably, the shares in Kendell were wholly owned by one of the Ansett companies.

MR ZWIER: By a holding company called Bodus Pty Ltd. The sale is
40 proceeding by way of a sale of share transaction, that is, Australia Wide which is purchasing the airline is doing so by buying the shares in Kendell.

HIS HONOUR: The shares owned by?

MR ZWIER: Bodus. But if I can perhaps just deal with it in stages. It's quite a complicated transaction. The reason fundamentally that Australia Wide are buying the shares is that Kendell Airlines, as with Hazelton, is the owner of an airline-operating certificate granted by the Civil Aviation Authority, and those licences take a period of time to be granted fresh. So it is more convenient for a speedy sale for the shares in the company to be sold rather than the business to be sold. But by virtue of a sale of shares a number of problems arise, for example - - -

10 HIS HONOUR: That enables you to sell it, as it were, as a going concern, I suppose.

MR ZWIER: Yes, your Honour. The problems that arise are that Kendell is still subject to a deed of company arrangement which we'd need to terminate. No purchaser would buy a company which is insolvent subject to a deed. That can only occur if there's a variation to the deed. Secondly, your Honour, Kendell itself is insolvent. It owes many millions of dollars. There's a significant deficiency and any proposed variation to the deed of company arrangement would extinguish all of its debts so that the new purchaser would in effect take Kendell with a limited group of assets and without any of the old liabilities which would be extinguished. That would require obviously amendments to the deed of company arrangement, but it creates problems with the secured creditors who are the defendants in this proceeding.

25 HIS HONOUR: Some of those for whom Mr Waters appears.

MR ZWIER: He does. Your Honour, Credit Lyonnais and, if I could just refer to the second defendant as DVB - I won't be as game as Mr Waters - they own between them 12 CRJ aircraft, Canadian Regional Jets, which I think the materials will constantly refer to as CRJ aircraft. I think perhaps the last one might have been sold. There may be 11. They own aircraft as agents for another 12 syndicates. Those aircraft presently are in Canada I think. Eight of the 12 are in Canada.

35 Your Honour, the debts which the company owes the two financiers in total is about \$320 million. Your Honour will appreciate that if the deed of company arrangement were to extinguish the debt of \$320 million, as is proposed, it would render the security - using Mr Handley's words - functus officio and that would not please the financiers terribly much. They would oppose such a transaction on the grounds that they are severely prejudiced by any such arrangement.

Of course, the proposed sale can't proceed without the extinguishment of the debt. So the solicitors for the purchaser, that is, Australia Wide, the solicitors

for the financiers Mallesons and the solicitors for the administrators have been trying to develop a cooperative scheme which would obviate the need to have an argument about whether or not the proposed variation ought to be set aside and which would obviate a large legal confrontation about how one would go
5 about selling Kendell Airlines. Your Honour will appreciate that the primary objects of Part 5.3A are to maximise the chances of a company remaining in existence, and this sale will see Kendell remaining in existence, albeit with Hazelton.

10 The second object is, if that's not possible, to maximise returns to creditors. This sale will maximise return to creditors. Your Honour, the only mechanism that all the parties could devise as between themselves that might satisfy the respective interest was to in effect vary the deed of company arrangement to extinguish the debt, to simultaneously have Kendell, which is presently the
15 beneficial owner of the CRJ aircraft, enter into a declaration of trust saying it holds those aircraft on trust for the financiers - - -

HIS HONOUR: This is at the moment of extinguishment.

20 MR ZWIER: At the moment of extinguishment, and for the parties to then approach the court and say to the court it would be just and convenient to appoint a receiver over those aircraft. I've left one important fact off, your Honour, and it's this: obviously with Kendell's demise there's been default under the security arrangements and the secured creditors have
25 appointed receivers and managers I think Messrs Stewart and Meredith of the firm Ferrier Hodgson are presently the receivers and managers of the aircraft. So what would be in effect - - -

HIS HONOUR: So you would be terminating that receivership and hopefully
30 putting immediately another receivership hat, albeit of a different colour, on the two receivers?

MR ZWIER: Yes, your Honour. That's exactly what's proposed. The difficulty of course, your Honour, is this: the settlement which is intended to
35 take place on Wednesday can only take place if this application in a sense has been dealt with before the proposed settlement on Wednesday because it would all follow on the Wednesday. A particular difficulty we see in relation to any order, which we would need to consider more fully, is how a court can make an order on a Tuesday, appointing receivers to trust property at a time the trust
40 doesn't exist. So, your Honour, we had some submissions we intended to make about all those matters when it was ultimately heard.

The second limb of the application relates to whether or not subsequent to the settlement on Wednesday if Kendell needs to describe itself in some form

"subject to receiver appointed". The new owner of Kendell Australia Wide Airlines will not proceed with the transaction if the company, Kendall, is required to hold itself out as being in receivership. They're not very happy to pay many millions of dollars to acquire a company which will hold itself out to creditors as being in receivership. So the second limb of the application related to relief pursuant to section 1318 of the Corporations Act, seeking to be relieved of an obligation if such an obligation existed.

The Australian Securities and Investments Commission have pointed out to me that there is authority which states that the court cannot, pursuant to that section, grant such relief. In the intervening period, your Honour, we will need to consider the implications of ASIC's position and whether that's so.

HIS HONOUR: I'm sorry, I don't understand how you want to use 1318.

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MR ZWIER: Subsequent to the settlement, Kendell will be - - -

HIS HONOUR: You want to remove the names in receivership?

MR ZWIER: Your Honour, the administrator's position is it doesn't need to have those words after its name because a receiver would only be appointed if the court were minded to do so over particular aircraft and not over the company. The purchaser or the new owner of Kendell is concerned about that issue and doesn't wish to breach the law, so requested us to add to the application paragraph 2 of the application, seeking relief pursuant to section 1318, so that if the court were minded to the view that the company is required to describe itself as in receivership, that the court might be able to obviate the requirement to comply with section 428 of the act.

HIS HONOUR: Just bear with me for one moment. I understand 428. I don't understand the relevance of 1318(2). That's where you can apply to a court to relieve a person in relation to proceedings for negligence, breach of trust, but I have difficulty understanding how that section enables you to - - -

MR ZWIER: Sorry, it may have been someone was intending to deal with it as an irregularity or had intended to seek the relief in relation - whether it could be done under Part 5.3A under section 447A.

HIS HONOUR: That's a different proposition.

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MR ZWIER: It is, your Honour. Unfortunately, your Honour, this transaction is proceeding with great haste, and unfortunately, it's clearly a mistake that it should refer to section 1318. It must be an application under a different provision or under Part 5.3A, perhaps under the powers of section 447A. I'm

not sure whether that can apply in relation to a receivership, so we will need to examine that issue further, your Honour.

5 HIS HONOUR: I wasn't being critical, I was just trying to work out the nature of the application that was being made. That means that what you're asking the court for is a final hearing; when? It sounds as if you are talking about Tuesday.

10 MR ZWIER: Yes, your Honour.

HIS HONOUR: Unless you want to do it via videoconferencing with a Qantas jet in the sky, it will have to be arranged through another judge. I think certain of my colleagues are conflicted out of this matter due to the representation of the parties. All I can do is - an arrangement will be made somehow and my associate will speak to the parties in the course of Monday morning. But when is the material going to arrive? At the moment there is only the application.

20 MR ZWIER: Your Honour, the variations, the deed of company arrangement, ought to be completed sometime late tonight. The various trust deeds should be completed also sometime later tonight. What is intended, your Honour, is actually to post the documents on the web site and they could be made available at relatively short notice.

25 HIS HONOUR: You told me you've had discussions with the ASIC. Have they been formally served with the application?

30 MR ZWIER: Your Honour, they might have been formally served but it would be fair to say that ASIC have little understanding presently of the complexity of this application.

HIS HONOUR: That's no reason for them not to be served.

MR ZWIER: They have been served.

35 HIS HONOUR: I think in the circumstances, a view I've taken in other matters in the course of the Ansett administration, it is desirable in the public interest that the ASIC be served lest it be thought that the matter should have been, as it were, further widely advertised. But I think the matter should be put up on the web site. Who will be appearing? There will be the administrators; Mr Waters, your interests will be appearing?

MR WATERS: Yes, your Honour.

HIS HONOUR: How about the purchasers, have they got any standing in the

matter?

MR ZWIER: As an interested party they may seek leave to be heard,
your Honour.

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HIS HONOUR: So they're on notice of it, of course.

MR ZWIER: Your Honour, the committee of creditors of Kendell, which is
really the Ansett committee, were informed of this application. It was then
10 envisaged it would be mentioned on Monday and the committee were informed
of that on I think last Wednesday evening. Today, Kendell held a further
meeting of its entire creditor group - which happened to be smaller in number
than the committee meeting of the Wednesday before - and all creditors were
15 told the matter would be mentioned again on Monday. They were invited to
appear or to convey to us any comments they might make. The
Commonwealth has been put on notice of the application.

HIS HONOUR: The Commonwealth has been put on notice?

20 MR ZWIER: Yes, your Honour.

HIS HONOUR: Is it anticipated that the Commonwealth might want
to appear? You will find out in due course?

25 MR ZWIER: Yes, your Honour.

HIS HONOUR: I'm only concerned that if other parties are going to wish to
come, they be put on notice as soon as possible so that we don't turn up on
Tuesday - like we had in one of the applications, I forget which one it was now,
30 where we had parties from Sydney and there was very, very short notice.
Again that's not a criticism. All I can do at the moment is indicate that I will
make inquiries of my colleagues to see if a judge can be made available on
Tuesday morning, at least to get the matter moving. I've had this hearing
recorded and I'll ask for a transcript to be prepared of it as soon as possible,
35 which hopefully will be made available in the course of Monday morning if
need be. That can be made available to suitable interested parties if need be.

MR ZWIER: Your Honour, I understand the difficulties with some of the
conflict issues, but in this particular proceeding I do not believe that there are
40 any issues of fact. I'm not sure whether that might have any relevance but this
application is only a question of law.

HIS HONOUR: I'll take that into account.

MR ZWIER: If your Honour pleases.

HIS HONOUR: Mr Waters, have you got anything to say in addition?

5 MR WATERS: No, your Honour, except this: that I should make it plain that the defendants support the application.

HIS HONOUR: Support the application?

10 MR WATERS: Yes, your Honour.

HIS HONOUR: What you're seeking to do, in effect, is to allow for the transfer of the title - to transfer the beneficial interest, the ultimate beneficial interest in the planes, but to maintain your security?

15 MR WATERS: No, your Honour. Our concern is that if ownership of the aircraft changes, which might happen otherwise, there would be tax implications which are difficult to sort out.

20 HIS HONOUR: I understand. You mean, other than by paying the tax?

MR WATERS: Precisely. It's important for ownership not to change. We don't want to stand in the way of a sale. In fact, we support a sale. But this structure is intended to achieve that result, your Honour.

25 HIS HONOUR: Yes, I understand. Well, you're in effect saying it's tax driven rather than preservation of security driven?

MR WATERS: Yes, your Honour.

30 HIS HONOUR: I understand that. Well, thank you for mentioning the matter this afternoon. There's no orders that you need me to make at this stage, it's too premature.

35 MR ZWIER: Save this, your Honour, and it was perhaps Mr Waters' suggestion, which I think might be sensible, that we might be in a position if the court had time on Monday to deal with it Monday afternoon. I'm not sure whether that's convenient to your Honour. But once the complicated facts are explained, it's a relatively short point. The only other fair thing that I think I
40 could say about it is, Ms Merkel and her team have not been able to find any authorities directly on the point of what is just and convenient as to justify the appointment of a receiver over trust property in circumstances where it's facilitating on a cooperative scheme the preservation of property with consequential tax issues.

HIS HONOUR: I understand that.

MR ZWIER: So it's an unusual application, your Honour.

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HIS HONOUR: The problem with me dealing with it on Monday afternoon, assuming you're right, I would doubt that I would be in a position to prepare and finalise written reasons for judgment which I think are important in a case like this - albeit it may not be opposed, there are important matters of principle involved - and to hand down those reasons for judgment before I go to the airport at 8 o'clock the next morning.

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MR ZWIER: Yes, I - - -

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HIS HONOUR: I don't think I can say anything further than that.

MR ZWIER: If your Honour pleases.

HIS HONOUR: I think it would probably be inappropriate certainly to start it before me Monday afternoon. I think probably the best thing to do is at this stage, what I'll do is I'll formally adjourn the further hearing of the matter to 10.15 on Tuesday morning subject to that date being vacated if found not suitable. Otherwise, I'll reserve the costs of the parties appearing this afternoon. Is there anything further, Mr Waters?

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MR WATERS: No, your Honour.

HIS HONOUR: Mr Zwier?

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MR ZWIER: If your Honour pleases.

**MATTER ADJOURNED AT 4.44 PM UNTIL
TUESDAY, 23 JULY 2002**