Dairy giant axes 140 WA jobs

Joseph Sapionza
Published: April 29, 2009 - 6:43PM

Up to 140 jobs face the axe at the Peters and Brownes plant in Balcatta after New Zealand dairy giant Fonterra sells its WA ice cream businesses to confectionery giants Nestle and Bulla Dairy Foods.

Nestle will acquire the Peters brand in Western Australia and the Connoisseur ice cream brand, while Bulla will acquire the license to manufacture and market the Cadbury ice cream range in Australia.

Under the plan, the Peters operation in WA will eventually move to the eastern states and the Balcatta ice-cream making site will close.

In a statement issued today, Fonterra expressed "regret the impact these decisions will have on our people" at the Balcatta factory.

"Given Nestle own the Peters brand in all states except Western Australia, they are the logical owners of the brand in Western Australia and the decision to sell the Peters brand to Nestle ensures Peters remains a strong vital brand in Western Australia," Fonterra Australia and New Zealand managing director John Doumani said.

The arrangements, which are expected to take effect at the end of June, will see Nestle consolidate the manufacturing of the Peters and Connoisseur brands at its Mulgrave facility in Victoria, a move that renders the Balcatta facility redundant.

In conjunction with Nestle's acquisition, Fonterra has agreed to sell its remaining ice cream business in Western Australia to Bulla.

The arrangement will eventually see Bulla producing the Cadbury ice cream brand in its Victorian facilities.

In the interim, Fonterra's Balcatta site will continue to produce this range. However, the company admitted that potentially up to 140 positions will be made redundant at the Balcatta site.

"We regret the impact these decisions will have on our people and we are doing everything possible to minimise the number of people affected by this announcement, including pursuing redeployment opportunities within Fonterra and employment opportunities with other companies," Mr Doumani said.

"We have in place a comprehensive program to assist impacted employees, including outplacement support and counselling.

"The redundancies will be phased over a period of time, we have endeavoured to provide as much notice as possible to our people and will be as flexible as possible to meet individual needs."

Fonterra's New Zealand ice cream business, Tip Top, and its remaining WA dairy business are unaffected by this announcement.

Separately, Fonterra has announced its intention to undertake a strategic review which will seek to maximise the
value and sustainability of its non-core regional liquid milk businesses in Australia, but Mr Doumani was quick to assure Fonterra's WA farmer suppliers that today's announcement had no impact on their milk supply arrangements.

"We collect over 130 million litres of milk in Western Australia annually and our growing Brownes brand portfolio will continue to require this secure supply of fresh high quality milk to produce its market leading, innovative products," he said.

This story was found at: http://www.watoday.com.au/wa-news/dairy-giant-axes-140-wa-jobs-20090429-an92.html
Fonterra ice-cream sale wipes 140 jobs

Published: April 30, 2009 - 12:01AM

THE New Zealand-owned dairy group, Fonterra, will shed up to 140 jobs when it closes ice-cream-making operations at its West Australian plant.

Fonterra announced the job cuts "out of the blue" to a meeting of more than 300 workers at its Balcatta plant in Perth's north-east yesterday, the Transport Workers Union said.

The workers were told the job losses were the result of the sale of the company's Peters Ice Cream operations in Western Australia to Nestle and Bulla.

A TWU spokesman, Rick Burton, said the Fonterra Brands director Peter Tedesco told the meeting the redundancies, to take effect between now and September, had nothing to do with the economic slowdown.

The company's Australia New Zealand managing director, John Doumani, said in a statement that Fonterra had signed binding agreements with Nestle Australia and Bulla Dairy Foods to sell its Australian ice-cream business.

Subject to regulatory approval, Nestle would acquire the Peters brand in WA and the Connoisseur ice-cream brand, and Bulla would gain the licence to manufacture and market the Cadbury ice-cream range in Australia.

Under the plan, the Peters operation in WA will eventually move to the eastern states and the Balcatta ice-cream-making site will close.

Mr Doumani said as a result of the sale "potentially up to 140 positions will be made redundant at Fonterra's Balcatta site".

"We regret the impact these decisions will have on our people and we are doing everything possible to minimise the number of people affected by this announcement, including pursuing redeployment opportunities within Fonterra and employment opportunities with other companies," he said.

Mr Burton said Mr Tedesco told the meeting the company had lost market share "and it would probably cost them a lot of money to get [it] back".

Mr Burton said some workers were obviously upset at losing their jobs, while others were "fairly happy because they have a very good redundancy package".

Fonterra's chief executive, Andrew Ferrier, told the Weekly News in January that Fonterra had not ruled out job cuts as part of cost-cutting measures. No specific numbers were mentioned, or which division or region of the company they would come from.

AAP

This story was found at: http://www.smh.com.au/business/fonterra-icecream-sale-wipes-140-jobs-20090429-anel.html
Brownes dairy back in Australian hands

Chalpat Sonti
Published: October 21, 2010 - 1:31PM

The state's largest dairy business is back in Australian hands after the New Zealand owner of Brownes finally offloaded the company.

Dairy giant Fonterra has sold the milk and fruit juice business to DairyWest, a consortium headed by Sydney-based Archer Capital.

Speculation had been rife in the industry that a deal had been inked with WA-based Harvey Fresh, but after looking to offload the business for some time, Fonterra has confirmed the sale to DairyWest this afternoon.

Fonterra sold the Peters ice cream business last year to Nestle - which owned the brand in every other state - and offloaded its Cadbury ice cream operation to Bulla.

Both buyers now make the ice cream in factories in Victoria. The Peters deal led to the loss of 140 jobs.

Negotiations with former owner Graham Laitt to buy the rest of the business broke down earlier this year.

Mr Laitt led a management buyout of the then-named Peters and Brownes in 1990, with Fonterra taking a stake in the company after he bought New Zealand's Tip Top ice cream from Heinz Watties in 1997.

Brownes collects 130 million litres of milk annually from about 70 farmers. Its major competitor in the state is National Foods, owner of the Pura brand and supplier to Woolworths.

Harvey Fresh is the third player, but has been aggressive in pricing in an endeavour to gain market share.

DairyWest will buy the Brownes milk and yoghurt brands, the Chill flavoured milk and Yogo brands, and a three-year licence to use the CalciYum and SupaShake flavoured milk brands in WA.

"The purchase of Brownes is an important transaction," DairyWest chairman Justin Punch said.

"DairyWest is attracted to WA's high growth economy, vibrant dairy market and Brownes' market-leading positions. In addition, its location in WA makes it ideally suited to capitalise on export opportunities into Asia."

Fonterra Brands Australia New Zealand managing director John Doumani said the decision to sell reflected strategic realities.

"Fundamentally Brownes is a regional business and it is not receiving the right level of focus within Fonterra," he said.

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This story was found at: http://www.watoday.com.au/wa-news/brownes-dairy-back-in-australian-hands-20101021-16v92.html
1 November, 2010 4:47PM AWST

Challenge Australia Dairy collapse not necessarily all bad for WA milk industry

By Sharon Kennedy (Cross Media Reporter)

Failure to open new markets is one of the reasons which could be put forward for the collapse of milk processor Challenge Dairy.

Meanwhile, according to dairy section vice president Phil Depiazza, the other issue for producers is price discounting in the local market.

President Peter Evans agrees. He's had nervous feeling about the WA dairy industry as a whole, he says though not only because of the Challenge difficulties.

"There's obviously an issue with processors and what's happening in the marketplace and our inability to extract the full value of milk."

Ironically, Challenge Dairy was established at the time of industry deregulation to provide some stability for WA by sourcing new markets.

"A good vision and well intentioned," is how Phil Depiazza describes the initiative. However, he says, Challenge hasn't had access to the drinking milk sector, which is where you get the best price".

Instead, he says the company has had to look for export or commodity markets with the consequence that it could not pay competitive price to suppliers.

Phil himself moved from supplying Challenge in November 1990, a "purely business decision", he says.

The stronger Australian dollar has not helped with overseas markets and the global financial crisis could have been the straw that broke the camel's back, says Phil.

Challenge placed itself into voluntary receivership last Thursday. Since then the state government has had talks with receivers Price Waterhouse Cooper but Peter Evans is not aware of the content of those talks.

Suppliers would rank with unsecured creditors if the business is wound up, is his guess. Cash flow will be an issue at this time with the need to buy grain, hay and silage for coming the summer months, he says.

"Hold on and hope," is the only advice he can give at this stage to those 70 farmers directly affected. Once the spring flush is over there will be little excess milk, he says. "Things should settle down."

Phil also believes that longer term, the industry will not automatically be worse off because of the failure of Challenge.

Since deregulation, numbers of producers have dropped from around 400 to 180. "We haven't seen that same rationalisation in the processing sector."
Four processors handling between 320 and 340 million litres isn't ideal, he adds. One less player will make it easier for the remaining, he believes.

"I think there's other areas for other processers to work on. The discounting on the local market regarding drinking milk is an issue - money taken out of the producer and processor sector and being retained by the retail sector."

The need to source new markets for WA milk remains, says Phil. Challenge, he said, was attempting to grow the WA industry. "An industry not growing is not going anywhere."

The government may be able to play a role in the situation but there is no turning back the clock to the time of regulation and the quota system, says Phil.

Meanwhile the WAFF is having with retailers and processors about discounting on the local market.
"We want to making sure that they're not overstepping the mark and colluding," he says.

The dairy herd on Malcolm Holm's property between Finley and Blighty ( Laurissa Smith – ABC Rural)
8 December, 2010 4:31PM AWST

Challenge for dairy industry with Challenge collapse

By Sharon Kennedy (Cross Media Reporter)

WA Minister for Agriculture Terry Redman says he will be keeping an eye on farm gate prices for milk following the collapse of Challenge Dairy

Challenge went into receivership two months ago. Since then, the Challenge Cooperative which supplied milk to the processor has also ceased operations.

Workers at the Boyanup plant were laid off at the beginning of December. Today, a further 32 workers were made redundant.

Receivers PwC partners Derrick Vickers and Kate Warwick say that, without a supply of milk, they're no longer able to keep the Boyanup and Capel plants operating.

The Minister says he is pleased that Challenge suppliers will now have their milk picked up other processors such as Harvey Fresh and Fonterra.

The issue of price is something that will play out in the market, he says.

Former Challenge suppliers will receive 32c a litre, compared to over 40c for other suppliers.

"I am really cautious about playing a role to interfere with the market," says the Minister. "I think the minute government does that, it gets into trouble. Government is not good at picking winners. We want to see a strong vibrant dairy industry in Western Australia."

Fonterra itself is not in a position to make long term decisions, he says, given that Fonterra and Brownes will be acquired by Dairy West in the new year.

"They (Dairy West) have given an undertaking that they are going to make significant investments in Western Australia in efficient processing facilities," says Mr Redman.

"That being the case, that means that they have confidence in the market place here and they're going to need milk to deal with that."

The government is currently involved in talks over the future of the Challenge facilities. "There's a number of discussions that we're having," says the Minister. The main issue for Western Australia, he feels, is the surplus of milk with the spring flush.

The government had previously signed a MOA with East Java for Challenge. With the winding up of that company, there are "opportunities that could be taken up and we are always on the lookout for international markets", says Mr Redman.

"We have a deregulated arrangement in the dairy sector. There have been four processors to date (since deregulation) and there certainly is a train of thought within the industry that that's probably too many."
The swift move by other processors to pick up the Challenge supply has given farmers some security, says the Minister. However, he acknowledges that "prices might be challenging".

The Minister is hopeful that, down the track, farmers will get some recompense for the money that they're owed. "In the short term, they need to manage what in some cases may be challenging financial circumstances."

Government cannot give direct aid to farmers waiting for money owed however, where government can play a role is with programs such as Taking Stock, he says. "That's where specialist local consultants will talk to farmers and hopefully help them make more informed business decisions."

Government also has a role helping redundant workers, he says. A one stop shop has been set up in Capel which can give training and support for people to move into new jobs.

The Minister is confident that the WA dairy industry will be able to manage the issues facing it. "The dairy industry is one of the most vibrant, progressive industries that I've seen in the agriculture sector." He adds, "They take on new technology and are forward thinking in what they do."

The strength of the Australian dollar doesn't help but WA's position near large asian markets is a "huge opportunity for us", says the Minister.

Looking at the bigger picture of global food security over the next 15 years, Mr Redman believes that this state is well placed to be able to meet that need.
Federal Court of Australia


Last Updated: 13 January 2011

FEDERAL COURT OF AUSTRALIA


Citation: Vickers, in the matter of Challenge Australian Dairy Pty Ltd (Administrators Appointed) (Receivers & Managers Appointed) [2011] FCA 10

Parties: DERRICK CRAIG VICKERS AND KATHRYN GUINIVERE WARWICK (IN THEIR CAPACITY AS JOINT AND SEVERAL RECEIVERS AND MANAGERS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED)) v CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED) (ABN 59 103 242 155)) and JEFFREY LAURENCE HERBERT AND SIMON GUY THEOBALD (IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED))

File number: WAD 393 of 2010

Judge: BARKER J

Date of judgment: 13 January 2011

Catchwords: CORPORATIONS – receivers – private receivership – whether
s 558(1) Corporations Act 2001 (Cth), entitling employees of a company in liquidation to payment for services under s 556, applies to companies in receivership.

**Held:** s 558 does not apply to companies in receivership

CORPORATIONS – receivers – private receivership – whether receivers personally liable under s 419 Corporations Act 2001 (Cth) to pay superannuation contributions, superannuation guarantee charges, annual leave or long service leave to employees who continue in employment after the appointment of receivers.

**Held:** receivers not personally liable

**Legislation:** Corporations Act 2001 (Cth) s 433(3)(c), s 433(9), s 556(1)(e), s 555(1)(g), s 558(1)

**Cases cited:**

*Australian Securities and Investments Commission v Marlborough Ltd* (1993) 177 CLR 485

*Love v The Image Centre Pty Ltd* (1991) 33 AILR 406


*Re Office-Co Furniture Pty Ltd* [2000] 2 Qd R 49

*Whitton v ACN 003 266 886 Pty Ltd* (1996) 42 NSWLR 123

**Date of hearing:** 20 December 2010

**Place:** Perth

**Division:** General Division

**Category:** Catchwords

**Number of paragraphs:** 65

**Counsel for the Plaintiffs:** Ms KF Banks-Smith

**Solicitor for the Plaintiffs:** Allen Arthur Robinson

**IN THE FEDERAL COURT OF AUSTRALIA**

**WESTERN AUSTRALIA DISTRICT REGISTRY**

**GENERAL DIVISION**

WAD 393 of 2010
IN THE MATTER OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) (ABN 59 103 242 155)

BETWEEN: DERRICK CRAIG VICKERS AND KATHRYN GUINIVERE WARWICK (IN THEIR CAPACITY AS JOINT AND SEVERAL RECEIVERS AND MANAGERS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED)) Plaintiffs

AND: CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED) (ABN 59 103 242 155) First Defendant

JEFFREY LAURENCE HERBERT AND SIMON GUY THEOBALD (IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED)) Second Defendants

JUDGE: BARKER J

DATE: 20 DECEMBER 2010

PLACE: PERTH

THE COURT DECLARES THAT:

1. Section 433 of the Corporations Act 2001 (Cth) does not oblige the plaintiffs to pay annual leave or long service leave entitlements pursuant to s 556(1)(g) of the Corporations Act, to employees of the first defendant:

1.1 who remained employed by the first defendant after the appointment of the receivers on 28 October 2010; and

1.2 to whom such entitlements had accrued as at 28 October 2010 and/or have accrued since 28 October 2010 but were or are not yet due and payable.

2. Section 433 of the Corporations Act does not oblige the plaintiffs to make payments under s 556(1)(e) of the Corporations Act in respect of superannuation contributions or superannuation guarantee charges which become due and payable during the plaintiffs' appointment as joint and several receivers and managers of the first defendant.

3. The plaintiffs are not personally liable under s 419 of the Corporations Act to pay superannuation contributions, superannuation guarantee charges, annual leave or long service leave entitlements to employees of the first defendant, to whom such entitlements:
3.1 accrue, but do not become due and payable; or

3.2 become due and payable,

during the plaintiffs’ appointment as joint and several receivers and managers of the first defendant.

THE COURT ORDERS THAT:

4. The plaintiffs’ costs be paid out of the assets of the first defendant on an indemnity basis.

5. The costs of the second defendants be costs of the voluntary administration of the first defendant and be paid from the assets of the first defendant, to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court’s website.

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION
WAD 393 of 2010

IN THE MATTER OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) (ABN 59 103 242 155)

BETWEEN:

DERRICK CRAIG VICKERS AND KATHRYN GUINIVERE WARWICK (IN THEIR CAPACITY AS JOINT AND SEVERAL RECEIVERS AND MANAGERS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED))
Plaintiffs

AND:

CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED) (ABN 59 103 242 155)
First Defendant

JEFFREY LAURENCE HERBERT AND SIMON GUY THEOBALD (IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF CHALLENGE AUSTRALIAN DAIRY PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED))
Second Defendants

JUDGE:
BARKER J

DATE:
13 JANUARY 2011

PLACE:
PERTH
DECLARATIONS AND ORDERS MADE UNDER S 424 CORPORATIONS ACT 2001 (CTH)

1. On 20 December 2010, I made the following declarations and orders on the application of the plaintiffs:

The Court Declares That:

1. Section 433 of the Corporations Act 2001 (Cth) does not oblige the plaintiffs to pay annual leave or long service leave entitlements pursuant to s 556(1)(g) of the Corporations Act, to employees of the first defendant:

(a) who remained employed by the first defendant after the appointment of the receivers on 28 October 2010; and

(b) to whom such entitlements had accrued as at 28 October 2010 and/or have accrued since 28 October 2010 but were or are not yet due and payable.

2. Section 433 of the Corporations Act does not oblige the plaintiffs to make payments under s 556(1)(e) of the Corporations Act in respect of superannuation contributions or superannuation guarantee charges which become due and payable during the plaintiffs’ appointment as joint and several receivers and managers of the first defendant.

3. The plaintiffs are not personally liable under s 419 of the Corporations Act to pay superannuation contributions, superannuation guarantee charges, annual leave or long service leave entitlements to employees of the first defendant, to whom such entitlements:

(a) accrue, but do not become due and payable; or

(b) become due and payable,

during the plaintiffs’ appointment as joint and several receivers and managers of the first defendant.

The Court Orders That:

4. The plaintiffs’ costs be paid out of the assets of the first defendant on an indemnity basis.

5. The costs of the second defendants be costs of the voluntary administration of the first defendant and be paid from the assets of the first defendant, to be taxed if not agreed.

2. These are the reasons for doing so.

FACTS

3. The application of the plaintiffs was supported by the affidavits of Derrick Craig Vickers (one of the plaintiffs) in his capacity as one of the receivers and managers of the first defendant, Challenge Australian Dairy Pty Ltd (Administrators Appointed) (Receivers & Managers Appointed) (the company), made 13 December 2010 and 16 December 2010, as well as an affidavit of Bryn Francis Dodson, solicitor, filed 20 December 2010. The facts outlined are drawn from those affidavits.

4. On 28 October 2010, the second defendants were appointed as joint and several voluntary administrators of the company.

5. Immediately following the appointment of the second defendants, the National Australia Bank Limited (NAB) appointed Mr Vickers and Kathryn Guinivere Warwick as joint and several receivers and managers of the company pursuant to a debenture dated 1 November 2006 granting to the NAB a
fixed and floating charge over the undertaking of the company and all of its assets, both present and future.

6. Prior to the appointment of the administrators and receivers, the company carried on business of manufacturing or processing dairy products at dairy facilities in Boyanup, Western Australia (the Boyanup dairy) where it produced bottled milk, skim milk powder and butter. At Capel (the Capel dairy) it produced milk for both domestic and export use and also produced whey powder and cheese.

7. The company obtained supplies of milk (CDC milk) from members of Challenge Dairy Co-Operative Limited (CDC), a company registered under the Companies (Co-Operative) Act 1943 (WA).

8. CDC is a substantial shareholder of the first defendant company.

9. Stated generally, historically in the course of its business, the company processed CDC milk which was then supplied in bulk to third party customers, or it used CDC milk at the Boyanup dairy and at the Capel dairy in the manufacture of milk and milk products which were then sold to customers.

10. Due to the nature of its operations, the limited supply of CDC milk and the fact that Capel dairy was running at a loss, the receivers decided on 4 November 2010 to put the Capel dairy on care and maintenance. As a consequence, the number of employees engaged at the Capel dairy progressively declined as employees were retrenched, resigned or relocated to work at the Boyanup dairy to allow them to continue their employment with the company.

11. Those employees who were retrenched are to be paid a retrenchment payment in accordance with s 433 of the Corporations Act 2001 (Cth) (the Act). However, the receivers have not paid those employees or the resigning employees any:

(a) entitlements in respect of any annual leave and long service leave that had not become “due” on the date of the receivers’ appointment; or

(b) superannuation or annual leave or long service leave entitlements falling “due” after the date of the receivers’ appointment.

12. From 30 October 2010 until 26 November 2010, CDC supplied the company with CDC milk (although a lesser quantity than CDC supplied to the company before the appointment of the receivers) without charging the company or the receivers for the CDC milk supplied.

13. The company then processed CDC milk at the Boyanup dairy and sold the product (mainly skim milk powder) to third parties. The company, to the best of the receivers’ knowledge and belief, presently has no binding, ongoing contracts with third parties for the supply of milk or milk products. After the appointment of the receivers the company sold its product by way of individual spot sales to existing customers.

14. As long as the company continued to receive a supply of CDC milk, these arrangements enabled it to continue limited operations at the Boyanup dairy and to retain a majority of staff employed at the Boyanup dairy, while exploring options that would allow some parts of the company’s operations to continue.

15. On 2 December 2010, the receivers were advised that CDC would no longer be in a position to supply CDC milk. No milk has been supplied since 26 November 2010. The company does not have the financial capacity to purchase milk from any other source. Without a supply of milk, the Boyanup dairy cannot continue to operate and the company has been unable to continue to employ the majority of employees. As a result, further retrenchments have been made. Again, those employees will be paid a retrenchment in accordance with s 433 of the Act. However, the receivers have not paid any employees any:

(a) entitlements in respect of any annual leave and long service leave that had not become “due” on the date of the receivers’ appointment; or
of the receivers’ appointment; or

(b) superannuation or annual leave or long service leave entitlements falling “due” after the date of the receivers’ appointment.

16. To the extent feasible, the company has continued to employ as many as possible of the company’s employees under their pre-existing contracts of employment, and has continued, and will continue, to pay the wages of staff who remain in the employment of the company.

17. The receivers understand that the majority of the company’s employees are or were employed:

(a) in respect of dairy production workers, under the terms of an Enterprise Bargaining Agreement, dated 19 December 2007, executed by the company and the Liquor Hospitality and Miscellaneous Workers’ Union (Union);

(b) pursuant to letter agreements between the company and individual employees, all of which were entered into prior to the appointment of the receivers (and all of which are in substantially the same terms);

(c) in respect of truck drivers employed by the company, pursuant to a certified agreement which came into force on 26 November 2004.

18. The receivers say they have made no new contracts of employment with employees of the company and have not sought to make amendments to pre-existing contracts of employment. Details of the employees and the different categories of employment were provided to the Court.

19. In summary, the receivers have estimated that in respect of those employees who have remained in the employment of the company following the appointment of the receiver, they have accrued approximately as follows:

(a) Accumulated rostered days off as at 7 December 2010: $69,000.

(b) Superannuation accrued prior to the receivers’ appointment: $41,600.

(c) Superannuation accruing since the receivers’ appointment as at 28 November 2010: $41,000.

(d) Annual leave accrued prior to the receivers’ appointment: $374,400.

(e) Annual leave accruing since the receivers’ appointment as at 7 December 2010: $35,100.

(f) Long service leave accrued prior to the receivers’ appointment: $210,900.

(g) Long service leave accruing since the receivers’ appointment as at 7 December 2010: $70.

(h) Pay for notice period: $236,200.

(i) Redundancy payments: $1,140,950.

20. The receivers say they intend to pay or have already paid to employees the amounts set out in (a), (b), (h), (i) of the preceding para, as well as wages as and when they fall due. The receivers have not paid the amounts in (c) to (g) of that paragraph, however, which as at 7 December 2010 totalled approximately $661,500.

21. On 9 November 2010, the receivers sold all of the company’s trailers to a third party, all leases of prime movers were terminated and that same third party leased those prime movers in its own name. The truck drivers previously employed by the company under the certified agreement were retrenched.
and are now employed by that third party. As a consequence, all employees employed pursuant to the certified agreement ceased to be employed by the company during the course of the receivership. The receivers have caused, or will shortly cause those drivers to be paid entitlements in respect of accumulated rostered days off, pay in lieu of notice and retrenchment but not the entitlements referred to above in (c) to (g) of para 19.

22. The receivers disclose that they have realised certain assets of the company subject to the floating charge aspect of the charge by entering into contracts for the sale of stock owned by the company and by collecting debts owing to it.

23. As at 3 December 2010, the receivers estimate:

(a) Sales and collections have raised approximately $4,000,000 after payment to employees of entitlements referred to at (a) of para 19 above, wages and certain operating and realisation costs and receivership expenses.

(b) The receivers anticipate that the sale of further floating charge assets and the collection of further debtors will raise approximately $5,500,000.

(c) The receivers are advised by NAB that the total amount outstanding to the NAB as at 13 December 2010 is approximately $6,500,000.

(d) Subject to the determination of the Court on this application, the receivers estimate that they will incur further costs, fees and expenses of approximately $3,000,000. This amount is made up of the amounts at (b), (h) and (i) of para 19 above, future wages, payment of debts incurred by the receivers, costs of realisation of assets, professional costs and the receivers’ remuneration, costs and expenses.

24. The receivers also disclosed that they are presently engaged in two confidential, parallel and alternative processes with interested parties, seeking expressions of interest and indicative offers for the sale of assets of the company, including land, plant and equipment; and negotiating with a potential purchaser of NAB’s debt and the securities held by it over the company.

25. At the time the initial application was made, the receivers considered that in order for them to complete the receivership and to comply with their obligations under the Act, it would be necessary to determine whether any additional entitlements of employees of the company, namely those set out at (c) to (f) of para 19 above, are entitlements:

(a) which must be made to employees pursuant to the s 433 of the Act, out of the assets the subject of the floating charge element of the charge, in priority to the NAB’s debt; and/or

(b) in respect of which the receivers are personally liable pursuant to s 419 of the Act (and in relation to which the receivers will seek to be indemnified by the company).

26. So far as the asset sale process is concerned, the receivers estimated that if these priority entitlements are required to be paid to employees, the receivers may need to raise approximately $500,000 from the sale of fixed assets to satisfy the NAB’s debt, excluding realisation costs and the receivers’ remunerations, costs and expenses.

27. If no priority entitlements are required to be paid, then the estimated realisation from floating charge assets may be sufficient to satisfy the NAB’s debt. That would allow a further chance that the fixed assets could be kept together and sold as an operation capable of being a going concern.

28. At the time the application was made in respect of the debt sale process, the purchase price of the debt and the securities held by NAB, as between NAB and the prospective purchaser of that debt and those securities, could only be determined once the receivers determined the amount they needed to
withhold to satisfy priority entitlements.

29. By Mr Vickers second affidavit made 16 December 2010, the Court was advised that the potential purchaser of the NAB’s debt and securities had decided that it did not wish to participate in a process by which it would purchase the debt of the NAB. Accordingly, the relief initially sought in para 4 of the application was no longer required and the receivers therefore focussed on the asset sale process. Accordingly, they sought declarations only in terms of paras 1, 2 and 3 of the application, as well as an order that they be paid their costs out of the assets of the first defendant on an indemnity basis.

30. The plaintiffs through their solicitors took steps not only to serve the second defendants as administrators of the company with the originating process, but also gave notice of the proceeding to the Union on the basis it may wish to represent the interests of the employees referred to in para 17 above.

31. In the event, solicitors for the second defendants indicated to the Court that after considering the papers filed by the plaintiffs they neither consented nor opposed the orders sought by the plaintiffs but did seek an additional order that:

   The costs of the second defendant be costs of the voluntary administration of the first defendant and be paid from the assets of the first defendant.

On the understanding that the plaintiffs consented to those terms, the second defendants did not attend the hearing.

32. Despite notice being given to the Liquor, Hospitality and Miscellaneous Workers’ Union, no representative of that Union attended the hearing of the plaintiff’s application.

33. The affidavit of Mr Dodson, filed 20 December 2010, sets out the repeated attempts made by the plaintiffs’ solicitors to ascertain the attitude of the Union to the application. On 13 December 2010, the originating process and supporting affidavit and submissions in support of it were served at the offices of the Western Australian Branch of the Union at 61 Thomas Street, Subiaco. On Tuesday 14 December 2010, Mr Dodson, a solicitor in the office of the plaintiffs’ solicitors, telephoned the office of the Union and spoke to a person who introduced himself as “Matthew”. Matthew indicated, following an inquiry from Mr Dodson, that he would get someone to call Mr Dodson. On Wednesday 15 December 2010, Mr Dodson again called the offices of the Union and again asked to speak to the person who was dealing with the Challenge Australian Dairy matter. He was then put through to a person who introduced himself as “Andrew”. Andrew indicated that the Union had received the paperwork and that the person dealing with the matter was Michael Alfrey, but he was not then available. Mr Dodson was told that Mr Alfrey would call him back. Mr Dodson indicated that the application was to be heard on the following Monday and that the plaintiffs wanted to understand the Union’s position before then. On Thursday 16 December 2010, the second affidavit of Mr Vickers was served on the Union.

34. On Friday 17 December 2010, at around 3pm, Mr Dodson made three attempts to call the Union, but each time he called the phone immediately cut out on making a connection and he was not able to speak to anyone. At around 4pm he was able to reach the Union’s phone number, but he was left on hold for about 10 minutes without being connected to an operator. Then between about 4.16pm and 4.30pm, he made four further attempts to call the Union, but each time he called the phone immediately cut out.

35. During the hearing of the application on 20 December 2010, at the request of the Court, a further attempt was made on behalf of the solicitors for the plaintiffs to telephone the Union and ascertain from a representative what the attitude of the Union was to the application then before the Court for hearing. I was soon after advised by counsel for the plaintiffs that a solicitor had spoken to Mr Alfrey and that the Union advised that did not intend to be heard on the application.

36. The circumstances in which the hearing then proceeded were that the workers potentially affected, who are ordinarily represented in industrial matters by the Union, did not appear to press any relevant interest or concern in relation to the matters raised by the application and which were well outlined in the written submissions filed on behalf of the plaintiffs and served earlier on the Union.

37. Further, the truck drivers referred to earlier had taken up alternative employment and in my estimation it was unlikely they would be further interested in the circumstances in the issues raised.

38. Equally in all of the circumstances it appeared to me that, if the Union was not concerned to agitate any issues on behalf of the workers who had interests under the Enterprise Bargaining Agreement, then other employees with interests under letter agreements were equally unlikely to wish to agitate any relevant interest in the matter.

39. Accordingly, I proceeded to hear the application ex parte.

CONSIDERATION

40. The plaintiffs seek to clarify their obligations and liabilities as receivers with respect to payments to those employees of the company who remained on as employees following the date of the appointment of the receivers.

41. As noted the receivers have continued to pay wages to those employees, but the question is whether certain other entitlements, namely leave payments and superannuation contributions are, to be paid to them either:

(a) as priority payments under s 433 of the Act; or

(b) on the basis that the receivers are personally liable for such entitlements under s 419 of the Act.

42. The receivers point out that while there is a prospect that most employees will be retrenched in the short term, some may continue to be employed by the company after the retirement or removal of the receivers. The question arises whether the receivers may be liable for employee entitlements which accrue after their retirement or removal, again under s 433 or s 419 of the Act.

43. The plaintiffs say the questions raised have either not been the subject of published reasons of the Court or have been the subject of conflicting decisions. They also say, through counsel, that receivers, as a matter of practice, sometimes choose of their own accord to follow one line of decision or the other. The amounts in question are not small (estimated at approximately $660,000) and the course of conduct by the receivers in the asset sale process may differ according to their liabilities to employees. Put simply, if the receivers are obliged to pay the relevant employees in priority to their appointor’s debt, then more assets will need to be realised before the receivers can satisfy their appointor’s debt and retire.

44. If the receivers are not liable for such payments, or they are not priority payments, then it may fall to the first defendants to deal with such payments to the employees. Accordingly, they were joined in the proceedings. Further, as the employees may have an interest in the determination of the issues, those who are Union members have been informed, via the Union of this application. For completeness, it should be noted that no issues arise on the application as to payment of entitlements to employees who were retrenched prior to or immediately upon the appointment of the receivers, or with respect to the retrenchment payments generally. From the receivers’ point of view, the law with respect to such payments is not considered contentious. The receivers are continuing to pay wages of continuing employees so no practical issue arises with respect to such wages.

45. It is generally accepted that the appointment of a receiver out of court, as here, does not itself terminate a contract of employment: McEvoy v Incat Tasmania Pty Ltd [2003] FCA 810; (2003) 130 FCR 503 (McEvoy) at [6].

46. I accept that in this case there has been no act by the receivers which suggests entry into new contracts
with the relevant employees or the personal adoption of pre-existing contracts. Therefore, the application proceeds on the basis that the relevant employees remained employed by the company under their pre-existing contracts despite the appointment of the receivers.

47. **Section 433** of the Act deals with payment of certain debts out of property the subject of a floating charge and priority to claims under the charge. **Section 433(3)(c)** in particular provides that:

   In the case of a company, the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
   (c) subject to subsection (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e)(g) or (h) or section 560.

48. **Section 433(9)** provides that for the purposes of *s 433*, the references in Div 6 of Pt 5.6 to the “relevant date” are to be read as “references to the date of the appointment of the receiver, or possession being taken or control being assumed, as the case may be”.

49. **Section 556(1)(e)** then gives a priority to “wages, superannuation contributions and superannuation guarantee charge payable by the company in respect of services rendered to the company by employees before the relevant date”.

50. **Section 556(1)(g)** gives priority to:

   all amounts due:
   (i) on or before the relevant date; and
   (ii) because of an industrial instrument; and
   (iii) to, or in respect of, employees of the company; and
   (iv) in respect of leave of absence.

51. The plaintiffs contend that, on the face of these provisions, only entitlements which are due and payable as at the date of the appointment of a receiver should be accorded the statutory priority. Further, the plaintiffs say that case law establishes, for the purposes of *s 556(1)(g)*, that leave of absence payments become due when either:

   (a) leave of absence (such as sick leave, annual leave or long service leave) is taken or approved to be taken; or

   (b) employees become entitled to a sum of money as payment in lieu (for example, when the employment ceases).


52. However, in this general context, *s 558* of the Act, which deals with debts due to employees, must be noted. **Section 558(1)** provides that where a contract of employment with a company “being wound up” was subsisting immediately before the relevant date, the employee under the contract is, whether or not he or she is a person referred to in subsection (2), “entitled to payment under *s 556* as if his or her services with the company had been terminated by the company on the relevant date”.

53. **Section 558** is within Pt 5.6 of the Act and so the definition of relevant date referred to above in *s 433(9)* — being a reference to the date of the appointment of the receiver — applies.

54. There is, on the face of it, however, a question whether *s 558(1)* can have effect for the purposes of
55. The reason the receivers sought directions and ultimately declarations concerning their obligations about priority payments is because there are two apparent competing first instance authorities on the question. In *Re Office-Co Furniture Pty Ltd* [1999] QSC 63; [2000] 2 Qd R 49 (*Re Office-Co Furniture*), the first in time, de Jersey CJ in the Supreme Court of Queensland, held that an employee of the company in receivership was entitled to payment for annual leave and long service leave entitlements in respect of employment prior to the appointment of the receivers with priority pursuant to s 433(3)(c) and s 556(1)(g), read with s 558(1) of the former *Corporations Law* – which are identical to the same provisions of the Act. The Chief Justice held that such a payment was not one in respect of the termination of the employee’s employment by the company within the meaning of s 556(1)(h).

56. Chief Justice de Jersey distinguished the earlier contrary decisions of *Love* and *Whitten* on the basis that each had failed to advert to s 558. At 2 Qd R 53, the Chief Justice said that the impact of s 558 operates, in the case of receivership, on s 556 and thence s 443. He disagreed with the contrary view expressed by Professor O’Donovan in *his work Company Receivers and Managers 2nd Ed*, para 11.800, which cited *Love* and stated that s 558 “only applies in company liquidations”. The Chief Justice considered that it can, albeit indirectly, apply to cases of receivership.

57. However, in *McEvoy*, the second in time, Finkelstein J in this Court, while agreeing that the two earlier decisions distinguished by Chief Justice de Jersey were properly distinguished because they had failed to regard s 558, chose not to follow *Re Office-Co Furniture*. In *McEvoy*, Finkelstein J noted, at [6], that the starting point in relation to the issue raised is to note the effect of the appointment of a receiver on a contract of employment. His Honour noted that it is generally accepted that the appointment of a receiver by a court terminates the contract, at least on the generally held view. He also noted that the opposite is true in the case of a privately appointed receiver who is the company’s agent. He noted that there is a similar dichotomy in the case of a winding up. The publication of a compulsory winding up order amounts to a dismissal of the company’s employees, though the contract of employment still remains on foot. His Honour noted that the situation is probably different in a voluntary winding up. He expressed the view that the position is not settled and in any event there is no justification for any difference. However, his Honour noted that the preponderance of authority favours the view that a voluntary winding up does not disturb a contract with an employee.

58. In those general circumstances, Finkelstein J then considered the legislative history of s 433. It is unnecessary here for me to recount what his Honour laid out in any great detail. See *McEvoy* at [8]–[16]. Ultimately, Finkelstein J, at [22], considered the legislative history to be important.

59. His Honour noted, at [23], that the construction question is whether the following words in s 433(3)(c), namely, “any debt or amount that in a winding up is payable in priority to other unsecured debts”, simply refers to the “debts and claims” mentioned in s 556(1) or, rather, whether they referred to those “debts and claims” as expanded, when necessary, by the application of the deeming provision in s 558(1). His Honour accepted, at [24], that there is something to be said in favour of the construction that results in the equality of treatment of employees in a winding up and in a receivership. First, the two sections, s 443 and s 556 are complementary. Secondly, if s 433 only picks up s 556(1) without the modification provided for by s 558(1), employees whose employment is brought to an end following the commencement of a receivership may not obtain any priority for accrued leave entitlements. On one view that would be inconsistent with the purpose of the statutory scheme, which is to confer benefits on employees of companies which cannot pay their debts.

60. Finkelstein J, at [25], then noted that there are many respects in which a receivership is unlike a liquidation. In most cases, once a company is placed in liquidation all employees will, in due course, be dismissed because a liquidation usually spells the death of a company. Receiverships, however, are different. In the first place, they do not affect the existence of the company. Secondly, it is often in the interests of the chargee for the company to continue its business. To that end, staff are kept on and are
often unaffected by the receivership. In those cases, a construction which places employees of a company in receivership on the same footing as employees of a company which has been wound up will operate in a discriminatory fashion, as the former employees will both keep their jobs and be paid out as if they had lost them. His Honour pointed out that such a construction could produce the absurd result that an employee may “work for up to 23 months without a holiday and up to 29 years without a long break”. As I understand it, that observation was made on the basis that if in a receivership employees are paid out for their holiday and long service leave entitlements, but the company survives receivership then the employees of the company, post the receivership, must have their leave and other entitlements computed afresh from the date they were paid out such entitlements, forward.

61. In these circumstances, Finkelstein J, at [26], considered the answer to the construction question is to be found in the legislative history of s. 558(1), including the evolution of the section. The history persuaded him that the only purpose for s. 558(1) was to ensure that employees would not in a winding up lose priority for annual and long service leave which was still accruing but which had not yet fallen due at the commencement of the winding up. In the absence of amending legislation (and the introduction of the deeming provisions), the employees whose employment was about to come to an end as a result of the winding up would be disadvantaged when compared with employees whose rights had accrued as they would miss out on the benefits which they were intended to be given. His Honour could discern no intention that the same benefits should be given to employees of a company in receivership, whose employment may survive the receivership. It could not be said that they would suffer in the same way as an employee whose company was unable to pay its debts in full. Finkelstein J expressly acknowledged, at [27], that the construction he preferred did not take into account the position of employees whose employment is terminated by the receivers. It seemed to him that their position is similar to that of the employee of a company that was being wound up prior to 1971, when these provisions were introduced. Subject to the possibility of those employees having claims against the receiver under s. 419, he considered the situation could only be remedied by Parliament.

62. One can readily see the force of the practical analysis provided by de Jersey CJ in Re Office-Co Furniture. In so many cases, a receivership does spell an end to a company. It would seem odd, if not unfair, that there should be two different sets of rules concerning payment of entitlements upon a winding up and in a receivership. Nonetheless, I feel persuaded by the analysis provided by Finkelstein J in McEvoy, particularly having regard to the legislative history of s. 443, and consider the better view is that s. 558(1) does not apply to receivership.

63. For these reasons, I think, although not without some hesitation, that I should apply the construction favoured by Finkelstein J. There is some real doubt in my mind that s. 558(1) is intended to apply a similar rule in relation to the entitlements of an employee in a receivership as it creates for a winding up. The legislative history is helpful in trying to discern the Parliamentary intent in relation to s. 558(1). It may well be that if this express issue concerning priority payments in the case of a receivership were to be raised with Parliament for the first time, it would agree with the outcome found by de Jersey CJ in Re Office-Co Furniture. However, presently all of the legislative history suggests to me that the Parliament was only ever focusing on winding up and did not apply its legislative mind to the circumstances of receivership. I have therefore concluded that I should follow the construction favoured by Finkelstein J in McEvoy.

64. In those circumstances the plaintiffs are entitled as declarations the “directions” that they seek in paras 1, 2 and 3 of the originating process. They are also entitled to have their costs paid out of the assets of the first defendant on an indemnity basis.

65. In the circumstances, I am also prepared to make the order sought on behalf of the second defendants that their costs be costs of the voluntary administration of the first defendant and be paid from the assets of the first defendant, but I would add that they should be taxed if not agreed.
I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 13 January 2011