

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
BEFORE THE COURT OF APPEAL
CIVIL DIVISION**

No 2115 of 2001

BETWEEN

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD
(ACN 065 590 178) (as trustee of the Ansett Australia Ground Staff Superannuation Plan)**

Appellant

and

**ANSETT AUSTRALIA LIMITED (Subject to Deed of Company Arrangement)
(ACN 004 209 410) & ORS**

Respondents

AFFIDAVIT OF ROSS NORMAN FREEMAN

Date of document 6 June 2003


Filed on behalf of the appellant

Prepared by
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Reference JFA RNF 30-4185285
Ross Freeman

On 6 June 2003, I **ROSS NORMAN FREEMAN** of Level 23, Rialto Towers, 525 Collins Street, Melbourne in the State of Victoria, solicitor, say on oath:

1. I am a member of the firm, Minter Ellison, the solicitors for the appellant. I am authorised to swear this affidavit on its behalf. Except where I otherwise indicate, I make this affidavit from my own knowledge.
2. The appellant is the trustee of the Ansett Australia Ground Staff Superannuation Plan ('the Plan'). Now produced and shown to me and marked "RNF-1" is a true and correct copy of the 1999 Consolidated Trust Deed dated 17 August 1999 for the Plan.


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SUPREME COURT PROCEEDING

3. On 7 February 2003, the Supreme Court of Victoria (Justice Warren) made orders implementing reasons for judgment published 20 December 2003 and revised on 7 February 2003 ('**Revised Reasons**'). Now produced and shown to me and marked in the manner indicated below are true and correct copies of the following:
- "RNF-2" Revised Reasons of Justice Warren dated 7 February 2003;
 "RNF-3" Authenticated order of Justice Warren dated 7 February 2003.
4. The Revised Reasons refer to the Third Amended Originating Motion, a true copy of which is now produced and shown to me and marked "RNF-4".
5. A Fourth Amended Originating Motion was filed to accommodate a change in the identity of the fourth defendant. Now produced and shown to me and marked "RNF-5" and "RNF-6" respectively, are true and correct copies of the Fourth Amended Originating Motion dated 20 February 2003 and the authenticated order of Justice Warren dated 20 February 2003 granting the appellant leave nunc pro tunc to file and serve the Fourth Amended Originating Motion.
6. In her Revised Reasons, the Honourable Justice Warren came to three principal conclusions. First, that all of the Plan members who had been made redundant by the administrators of Ansett were entitled to retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed for the Plan (as opposed to benefits under Rule 1.12, being the benefits payable to any member on leaving the service of Ansett): para 378(1) of the Revised Reasons.
7. The significance of this finding was that, in general, retrenchment benefits are greater than benefits on leaving service only (referred to as the resignation benefits), and lead to a greater call for contributions from Ansett, in order that benefits can be paid.
8. The second principal conclusion reached by Justice Warren was that the Funding and Solvency Certificates issued by the Plan's Actuary, Mr Paul Francis, on 23 January 2002 and 24 April 2002 ('**FSC4 and FSC5 respectively**'), pursuant to the requirements laid down in the *Superannuation Industry (Supervision) Act 1993 and Regulations*, were valid and enforceable: paras 86-93 and 240-242 of the Revised Reasons. Now produced and shown to me and marked "RNF-7" are true and correct copies of FSC4 and FSC5.

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9. The significance of this finding is that Mr Francis in FSC4 and FSC5 had required Ansett to pay to the appellant the difference between each member's resignation benefit and retrenchment benefit, where the member was entitled to a retrenchment benefit and it was greater than the resignation benefit. The difference in each case was divided by 0.85, in order to allow for the 15% contributions tax.
10. A related finding was that the terms of the standard Ansett contract of employment (between Ansett and any Plan member) led to the conclusion in paras 245-6 of the Revised Reasons that:
- 'there was a contractual obligation imposed on Ansett to contribute an amount to the Plan that was sufficient to provide the benefits promised by the Plan including the retrenchment benefit under rule 1.13'
11. Justice Warren did not make any findings as to the quantum of the difference between resignation and retrenchment benefits for the Plan as a whole.
12. In paragraph 246 of the Revised Reasons, Justice Warren found that the obligations under the contract of employment were "commensurate" with those under FSC4/5. The appellant trustee says that the trial judge was in error, and has understated the effect of her finding on the contract of employment obligations.
13. The third principal conclusion reached by Justice Warren was that the appellant did not have any status as a priority creditor under sub-sections 556(1)(a), (c), (dd) or (e) of the *Corporations Act 2001* for the amounts described under FSC4 and FSC5 as the difference (for each member made redundant, as applicable) between resignation and retrenchment benefits, and allowing for the 15% contributions tax.
14. A related finding was that the regular, 9% of salary contributions required of Ansett by FSC4 and FSC5 did have priority under s 556(1)(a). The ultimate findings are set out in the final orders made on 7 February 2003, which are exhibit RNF-3 to this my affidavit.

STATUS OF THE APPEAL

15. The appellant's Notice of Appeal was filed and served on 24 March 2003. Now produced and shown to me and marked "RNF-8" is a true and correct copy of the Notice of Appeal. The general ground of appeal (para. 1 of the Notice) is against the third principal conclusion referred to above in paragraph 13 of my affidavit. That is, that Justice Warren erred in refusing to hold that the appellant did not have any status as

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a priority creditor under sub-sections 556(1)(a), (c), (dd) or (e) of the *Corporations Act* 2001 for the amounts described under FSC4 and FSC5 as the difference (for each member made redundant, as applicable) between resignation and retrenchment benefits, and allowing for the 15% contributions tax.

16. The respondents have cross-appealed against the orders made by Justice Warren in respect of the second principal conclusion referred to above in paragraph 8 of my affidavit, and have also filed and served a Notice of Contention in relation to the priority issue. Now produced and shown to me and marked "RNF-9" and "RNF-10" are true and correct copies of the respondents' Notice of Cross Appeal dated 7 April 2003 and the respondents' Notice of Contention dated 11 April 2003.

PROPOSED AMENDMENT TO NOTICE OF APPEAL

17. By letter dated 30 April 2003 from its solicitors, the appellant sought the leave of the Registrar of the Court of Appeal pursuant to rule 64.06(2) to amend the Notice of Appeal dated 24 March 2003, as the appeal book has not yet been settled. Now produced and shown to me and marked "RNF-11" and "RNF-12" respectively are true and correct copies of the letter dated 30 April 2003 to the Registrar and the proposed amended notice of appeal which was enclosed.
18. In that letter, the Registrar's attention was drawn to the fact that in the respondents' outline of submissions filed on 29 April 2003 in response to the appellant's application for an expedited hearing of the appeal, the respondents stated that they would oppose any application to amend the notice of appeal. Now produced and shown to me and marked "RNF-13" is a true and correct copy of the respondents' outline of submissions filed on 29 April 2003.
19. In response to the letter dated 30 April 2003, Master Dowling directed that the appellant serve a copy of the proposed amended notice of appeal on the respondents and seek confirmation of whether the amendment was consented to or opposed. Now produced and shown to me and marked "RNF-14" is a true and correct copy of a facsimile dated 30 April 2003 to the respondents' solicitors (without attachments) enclosing by way of service the appellant's proposed amended notice of appeal and seeking confirmation as to the respondents' attitude to the amendment.
20. By letter dated 5 May 2003 to the Registrar, the respondents confirmed that they opposed the appellant's request for leave to amend the notice of appeal on the grounds set out in their outline of submissions filed 29 April 2003. Now produced and shown to


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me and marked "RNF-15" is a true and correct copy of the letter dated 5 May 2003 from the respondents' solicitors.


21. The proposed amendments to the notice of appeal relate to Ansett's obligations under the standard Ansett contract of employment. The appellant wishes to seek an order from the Court of Appeal about this contractual obligation to ensure that Ansett will have to make a contribution in an amount sufficient to pay all member benefits in full, and not just the amount required by FSC5.
22. Now produced and shown to me and marked "RNF-16" is a true and correct copy of the final form of the draft amended notice of appeal, in respect of which the appellant seeks leave.
23. As stated above in paragraph 9 of my affidavit, FSC5 had required Ansett to pay to the appellant the difference between each members' resignation benefit and retrenchment benefit, where the member was entitled to a retrenchment benefit and it was greater than the resignation benefit.
24. On 29 April 2003, Mr Francis issued a Special Funding and Solvency Certificate (SFSC), a copy of which is now produced and shown to me and marked "RNF-17". In general terms, SFSC requires payment (subject to the conditions set out in SFSC) of a lump sum amount of \$130M (or such lower amount as advised in writing by the Plan Actuary within the duration of the Certificate).
25. On 5 June 2003, I was informed by Mr Paul Daniel Francis, the actuary for the Plan, and believe that, in general terms, the main differences between FSC5 and SFSC are that:
- (a) FSC5 required Ansett to pay the difference between the resignation and retrenchment benefits only, whereas the figure of \$130M referred to in SFSC was calculated by reference to the sum of:
 - (i) the difference between the resignation and retrenchment benefits; and
 - (ii) the difference between the value of the resignation benefits and the Fund assets.
 - (b) FSC5 was prepared on the assumption that less than one hundred per cent (100%) of the members would be retrenched. SFSC was prepared on the assumption that all members will be retrenched; and

(c) whereas SFSC requires payment of the amount of \$130M, Mr Francis' best estimate of the amount required to be contributed pursuant to FSC5 is \$120M.

SWORN at Melbourne
by **ROSS NORMAN FREEMAN**
on 6 June 2003

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before me


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