

**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

CERTIFICATE IDENTIFYING EXHIBIT

This is the exhibit marked '**RNF-12**' now produced and shown to **ROSS NORMAN
FREEMAN** at the time of swearing his affidavit on 6 June 2003.

before me

Annabelle Lyn Mann
.....

ANNABELLE LYN MANN
525 Collins Street, Melbourne
A current practitioner within the
meaning of the Legal Practice Act 1996

**'RNF-12' copy of the
proposed Amended Notice of
Appeal.**

Filed on behalf of the appellant

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Respondents

**AMENDED NOTICE OF APPEAL
(Amended pursuant to the Leave of the Registrar
given on _____ 2003)**

Date of document 24 March _____ 2003

Filed on behalf of the appellant

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Ross Freeman

TO Ansett Australia Limited (Subject to Deed of Company Arrangement) (A.C.N. 004 209 410)
Mark Francis Xavier Mentha
Mark Anthony Korda

TAKE NOTICE that the appellant appeals to the Court of Appeal of the Supreme Court of Victoria against the judgment of and orders made by the Honourable Justice Warren on 7 February 2003.

NOTE: In this Notice of Appeal:

'Act' means the *Corporations Act* 2001 (Cth);

'FSC' means a funding and solvency certificate made by an actuary of the Plan pursuant to Division 9.3 of the *Superannuation Industry (Superannuation) Regulations 1994*;

'FSC4' means the funding and solvency certificate made by the actuary of the Ground Staff Plan dated 23 January 2002 and having an effective date of 23 October 2001;

'FSC5' means the funding and solvency certificate made by the actuary of the Ground Staff Plan dated 24 April 2002 and having an effective date of 24 April 2002;

'Ground Staff Plan' or 'Plan' means the defined benefit superannuation scheme established pursuant to rules contained in Schedule 2 to the Trust Deed;

'Membership Group 3' refers to the group of members identified as such in Appendix B in each of FSC4 and FSC5 in respect of whom certified minimum contributions (as described) are required by the Plan's actuary;

'Motion' means the Fourth Amended Originating Motion;

'Relevant date' is the date of the commencement of the administration of Ansett, namely 12 September 2001;

'Superannuation Guarantee Charge' means the charge imposed pursuant to s.5 of the *Superannuation Guarantee Charge Act 1992 (Cth)*;

'Trust Deed' means the Ansett Australia Ground Staff Superannuation Plan 1999 Consolidated Trust Deed made 17 August 1999;

'Trustee' means the appellant.

PERSONS UPON WHOM THIS NOTICE IS TO BE SERVED:

Ansett Australia Limited (Subject to Deed of Company Arrangement) (A.C.N. 004 209 410)

Mark Francis Xavier Mentha

Mark Anthony Korda

SCOPE OF THIS APPEAL

On 7 February 2003, Justice Warren made orders in response to paragraphs 1 to 14 of the relief sought in the Motion. Her Honour made orders as follows with respect to the Ansett Australia Ground Staff Superannuation Plan:

Paragraph 1

All members of the Ansett Australia Ground Staff Superannuation Plan ('**Ground Staff Plan**') who have been made redundant by Messrs Mentha and Korda as administrators of Ansett Australia Limited (which is now subject to a Deed of Company Arrangement) ('**Ansett**') since 12 September 2001 are entitled to retrenchment benefits under rule 1.13 of the First Schedule to the Trust Deed dated 17 August 1999.

Paragraph 4

Unnecessary to answer.

Paragraph 7

Unnecessary to answer.

Paragraph 8

Unnecessary to answer.

Paragraph 12(a)

Ansett Australia Limited (Subject to Deed of Company Arrangement) (A.C.N. 004 209 410) is obliged to make further contributions for Membership Groups 1 and 3 in accordance with the requirements of the Funding and Solvency Certificate dated 24 April 2002 issued by the actuary of the Ground Staff Plan ('**FSC5**'). It is unnecessary to answer in relation to Membership Group 2.

Paragraph 13

Unnecessary to answer in relation to the Ground Staff Plan.

Paragraph 14

In relation to the Ground Staff Plan:

- (a) The further contributions required for Membership Group 3 under FSC5 are not expenses within the meaning of s.556(1)(a). The further contributions required for Membership Group 1 under FSC5 from Ansett are expenses within the meaning of s.556(1)(a). It is unnecessary to answer in relation to the contributions for Membership Group 2.
- (b) The further contributions required for Membership Groups 1 and 3 under FSC5 are not debts within the meaning of s.556(1)(c). It is unnecessary to answer in relation to Membership Group 2.

- (c) The further contributions required for Membership Groups 1 and 3 under FSC5 are not expenses within the meaning of s.556(1)(dd). It is unnecessary to answer in relation to Membership Group 2.
- (d) The further contributions required for Membership Groups 1 and 3 under FSC5 are not superannuation contributions within the meaning of s.556(1)(e). It is unnecessary to answer in relation to Membership Group 2.

The appellant appeals against the orders made by Her Honour in response to paragraphs 12(a), 14(a), (c) and (d) of the Motion, ~~insofar as those orders refer to the further contributions required for Membership Group 3 under FSC5 for the Ground Staff Plan.~~

ORDERS SOUGHT IN THIS APPEAL

The appellant seeks the following orders:

1. This appeal be allowed.
2. The orders made in response to paragraphs 14(a), (c) and (d) of the Motion be set aside insofar as they refer to the further contributions required for Membership Group 3 under FSC5 for the Ground Staff Plan.
3. In lieu thereof, orders and declarations as follows:
 - (a) Declare that any further contributions required for Membership Group 3 under FSC4 or FSC5 are expenses within the meaning of s.556(1)(a) of the *Corporations Act 2001*;
 - (b) Alternatively, (to any extent that s.556(1)(a) does not apply) declare that the said further contributions are expenses within the meaning of s.556(1)(dd) of the Act;
 - (c) Alternatively, (to any extent that s.556(1)(a) or s.556(1)(dd) do not apply) the said further contributions are superannuation contributions within the meaning of s.556(1)(e) of the Act to the extent that they are payable in respect of services rendered to Ansett by its employees before 12 September 2001.

4. The order made in response to paragraph 12(a) of the Motion is to be varied by adding the further sentence:

Ansett Australia Limited (Subject to Deed of Company Arrangement) (A.C.N. 004 209 410) is also obliged to make further contributions under its contractual obligations under the contract of employment to contribute amounts to the Plan that are sufficient to provide the benefits promised by the Plan including the retrenchment benefits under Rule 1.13.

5. The order made in response to paragraph 14 of the Motion be varied by adding the further separate sentence:

Further declare that any further contributions required pursuant to the said contract of employment are expenses within the meaning of s 556(1)(a); alternatively expenses within the meaning of s 556(1)(dd); alternatively, to any extent that s 556(1)(a) or (dd) do not apply, that the said further contributions are superannuation contributions within the meaning of s 556(1)(e) to the extent that they are payable in respect of services rendered to Ansett by its employees before 12 September 2001.

~~(4)~~6. Orders as to costs.

GROUNDS OF APPEAL

In relation to FSC4 and FSC5

1. The general ground of appeal is that the trial judge erred in refusing to make any of the declarations sought by the Trustee under paragraphs 14(a), (c) or (d) of the Motion that the further contributions required for Membership Group 3 under FSC4 or FSC5 were entitled to priority under s.556(1)(a), (dd) or (e) of the *Corporations Act* 2001.
2. The trial judge should have held that the further contributions required for Membership Group 3 under FSC4 or FSC5 were entitled to priority under s.556(1)(a); or under s.556(1)(dd) to any extent that they did not have priority under s.556(1)(a); or under s.556(1)(e) to any extent that they do not have priority under s.556(1)(a) or (dd).
3. In particular, the trial judge erred in holding that the express reference to 'superannuation contributions' in s.556(1)(e) necessarily excluded the possibility that superannuation

contributions could be included within 'expenses' referred to in s.556(1)(a), or (semble) s.556(1)(dd).

4. The trial judge erred in finding (despite the holding described in ground (c), above) that the contributions for Membership Group 1 in FSC5 were expenses under s.556(1)(a), and the contributions for Membership Group 3 in FSC5 were not expenses under s.556(1)(a).
5. The trial judge should have held that the contributions for each of Membership Groups 1 and 3 were expenses for the purposes of s.556(1)(a).
6. The trial judge erred in holding that s.556(1)(a) only included recurrent expenses, such as rent, and included the contributions for Membership Group 1.
7. The trial judge should have held that s.556(1)(a) was not limited to recurrent expenses, such as rent, and should have held that s.556(1)(a) included the contributions for Membership Group 3; alternatively the trial judge should have accepted that the contributions for Membership Group 3 qualified under s.556(1)(a) as 'recurrent' expenses.
8. The trial judge erred in finding that the conduct of the administrators from the relevant date onwards was not conduct in the nature of preserving, realising or getting in the property of Ansett or carrying on the business of Ansett and that therefore, insofar as the conduct may have given rise to an obligation to make superannuation contributions under Membership Group 3, that obligation was not incurred in preserving, realising or getting in the property of Ansett or carrying on the business of Ansett.
9. The trial judge erred in holding that the retrenchment of the employees of Ansett by the administrators did not form part of the continuation of the business of Ansett.
10. The trial judge erred in construing s.556(1)(a) in that she held that expenses incurred in respect of a business carried on by the administrators after the relevant date that was 'an inherently different business in service, size and scale' from the business carried on by Ansett before the relevant date could not be expenses incurred in preserving, realising or getting in the property of Ansett or in carrying on the business of Ansett.
11. The trial judge erred in holding, or taking into account as relevant, that any liability to make further contributions arose out of terminations of employees as a consequence of a

- company going into administration and not as a result of the administrators incurring expenses for the purposes described in s.556(1)(a).
12. The trial judge should have held that the conduct of the administrators that gave rise to the incurring of obligations to make contributions for Membership Group 3, namely the continuation of the Ground Staff Plan after the relevant date and the redundancies of Plan members as part of administering the affairs of Ansett, was such that the obligation was incurred as part and parcel of preserving, realising or getting in the property of Ansett or carrying on the business, within the meaning of s.556(1)(a).
 13. The trial judge erred in holding that it was irrelevant that FSC4 and FSC5 had a statutory basis, namely under the *Superannuation Industry (Supervision) Regulations*.
 14. The trial judge erred in failing to consider whether the contributions required for Membership Group 3 were expenses incurred within s.556(1)(dd). To the extent that such expenses were not within s.556(1)(a), the trial judge should have found that they were within s.556(1)(dd).
 15. The trial judge erred in holding that any liability to make further contributions for Membership Group 3, under the Trust Deed and the legislative regime and also under the contract of employment, was incurred by Ansett in transactions entered into before the relevant date.
 16. The trial judge should have held that the liability to make further contributions for Membership Group 3 was incurred under statute, or the Trust Deed or the contract of employment after the relevant date for the purposes of s.556(1)(a) (or of s.556(1)(dd) if need be) either upon the issue of FSC4 or FSC5, or upon the occurrence of the events referred to therein, namely the advice to the Trustee of the entitlements of members to retrenchment benefits.
 17. If the trial judge was correct in finding that the contributions for Membership Group 3 were contingent claims incurred before the relevant date, the trial judge has erred in finding that the *Lundy Granite* principle did not apply.
 18. The trial judge should have found that the *Lundy Granite* principle did apply to the continuation of the Ground Staff Plan by the administrators in order to reduce or remove

the superannuation guarantee charge, that the Plan was retained for the benefit of the administration and that the contributions for Membership Group 3 are expenses for the purpose of s.556(1)(a) (alternatively s.556(1)(dd)).

19. To any extent that the contributions for Membership Group 3 are not within s.556(1)(a) or (dd), the trial judge erred in not considering whether they were within s.556(1)(e).
20. The trial judge should have held, to the extent that neither s.556(1)(a) nor s.556(1)(dd) applied, that s.556(1)(e) applied to the contributions for Membership Group 3 to the extent that they were for services rendered before the relevant date and regardless of whether the contributions are classifiable as contingent obligations or not, or incurred before or after the relevant date.

In relation to the Contract of Employment

21. The trial judge should have held that under the 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) was an expense within the meaning of s 556(1)(a) or s 556(1)(dd) or, in the event that neither s 556(1)(a) nor s 556(1)(dd) applied, that it was a superannuation contribution within the meaning of s 556(1)(e) to the extent that it was in respect of service before 12 September 2001.

DATED: 24-March-_____2003

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MINTER ELLISON
Solicitors for the Appellant