

**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

**SUBMISSIONS BY APPELLANT IN SUPPORT OF APPLICATION TO
AMEND NOTICE OF APPEAL**

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Filed on behalf of the Appellant

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Reference: JFA RNF 30-4185285
Ross Freeman

Application

1. The Appellant applies to file and serve an Amended Notice of Appeal in the form of exhibit "RNF16" to the affidavit of Ross Norman Freeman sworn 6 June 2003.

Background to the application

2. The Ansett Australia Ground Staff Superannuation Plan ("Ground Staff Plan") is a regulated superannuation fund under the *Superannuation Industry (Supervision) Act 1993*, and is governed by that Act and the Regulations made thereunder.
3. The Appellant is the Trustee ("Trustee") of the Ground Staff Plan.
4. The membership of the Ground Staff Plan has been drawn from the employees of Ansett Australia Limited ("Ansett"), which is under a deed of company arrangement. Messrs. Mentha and Korda are the deed administrators.
5. Administrators were appointed to Ansett in September 2001, at which time there were thousands of members in the defined benefit section of the Ground Staff Plan.
6. Since September 2001, there have been thousands of redundancies of the members of the Ground Staff Plan. The ultimate issue in the proceeding heard by Warren J. was whether or not Ansett was obliged (as a question of priorities under insolvency law) to make substantial payments to the Trustee to remedy the perceived shortfall in the assets of the Plan so far as payments of defined benefits to members were concerned.

Issues before trial court

7. The issues in the Trustee's Third Amended Originating Motion that were decided by Warren J. amounted to the following:

- (a) whether a defined benefit member who had been made redundant was entitled to a “retrenchment benefit” pursuant to Rule 1.13 under the Plan. The drain on the assets of the Plan was greater if “retrenchment benefits” were payable rather than what might be called “resignation benefits” under Rule 1.12 thereof;
- (b) whether Ansett was obliged by law to make further contributions to the Trustee of the Ground Staff Plan. That issue was subdivided into two issues: whether Ansett was obliged to comply with a Funding and Solvency Certificate issued by the Actuary of the Ground Staff Plan under the *Superannuation Industry (Supervision) Regulations*; and whether the standard contract of employment between Ansett and its employees embodied a promise by Ansett to fully fund the payment of defined benefits;
- (c) whether, assuming Ansett was obliged to make further contributions to the Trustee of the Ground Staff Plan, the obligations to make further contributions count as a priority obligation in an insolvency, as if s.556(1) of the *Corporations Act 2001* was applicable.

Reasons of the trial judge

Entitlement to retrenchment benefits

8. Warren J. decided that those members of the defined benefit section of the Ground Staff Plan who had been made redundant

were entitled to be paid "retrenchment benefits". Neither the Appellant nor the Respondent have raised any issue as to the correctness of that decision.

Obligation on Ansett to pay pursuant to funding and solvency certificate

9. Warren J. decided that the funding and solvency certificates issued by the Plan's actuary were valid and that Ansett was obliged to make the contribution required by those certificates which were known as FSC4 and FSC5. The contribution required were to be paid according to a formula (set out at par. 89 of the Revised Reasons for Judgment of 7 February 2003) that, for each member entitled to a retrenchment benefit, Ansett was obliged to pay the difference between that member's retrenchment and resignation benefit divided by 0.85 (to account for 15% contributions tax). That formula does not produce the same result on an obligation to fully fund all defined benefits that are payable, since the formula does not provide funding for a gap between available assets and resignation benefits.
10. The Respondents have crossed-appealed against the decisions of Warren J. that FSC4 and FSC5 are valid, and that Ansett is obliged to pay in accordance with them.

Obligation to pay under the contract of employment

11. Warren J. also decided that the contract of employment imposed an obligation upon Ansett to make such contributions (to the

Trustee) as will ensure that defined benefits can be paid. See paras. 245-6 of the Revised Reasons. The trial judge found that the contract of employment obligation was “an additional or commensurate obligation” to the obligation which arose under “both the trust deed and the SIS legislation” i.e. FSC4/5. See judgment at para 246.

Form of orders

12. The difference between the contractual obligation and the “trust deed and SIS legislation” obligation is that the contractual obligation is capable of extending beyond the obligation to make the contributions required by FSC4 and FSC5. It is respectfully submitted that the reference “(Ansett) is obliged to make further contributions ... in accordance with the requirements of (FSC5)” in paragraph 12(a) of the Order made 7 February 2003 is consistent with both the obligation to pay under the Trust Deed and the obligation under the contract of employment. However, the Trustee wishes to contend that the measure of the obligation under the contract of employment may not be commensurate with the obligations under FSC4 and FSC5 and may, in certain circumstances, be greater.

Submission

13. The Appellant submits that the orders in response to paragraphs 12(a) and 14 of the Fourth Amended Originating Motion (which was filed to take account of a change in parties; there is no difference otherwise between it and the Third

Originating Motion) ought to be supplemented (as described in Orders Nos. 4 and 5 of the proposed Amended Notice of Appeal) to take account of the difference referred to above, and there is an additional ground of appeal (Nos. 21-23) in the proposed Amended Notice of Appeal.

14. If the Appellant's application to amend is refused, the Appellant will be obliged to await the result of the appeal (and any subsequent appeal of the High Court) to ascertain whether there is anything in the reasons of the ultimate appellant decision that will either prevent or require a fresh proceeding to be brought to determine the viability of this point of difference between the contract of employment and the funding and solvency certificates. If such a proceeding were brought, the obvious risk is that the Respondents will assert an issue estoppel. The latest advice from the Ground Staff Plan actuary is that a contribution based on FSC4/FSC5 will be some \$9 million short of enabling all defined benefits to be paid. Thus, the amount involved is substantial.
15. No further evidence is required in order for the Court of Appeal to consider the proposed amendments.

Contract of employment at trial

16. The issue of the obligation under the contract of employment and its entitlement, if any, to priority was the subject of extensive argument before the trial judge.
17. See, in particular:

- (a) "Final Submissions on behalf of the Plaintiffs" filed 19 August 2002 esp. pars. 150-157; and Appendix C thereto;
 - (b) Submissions filed on behalf of the Third Defendant, esp. pars. 43-47;
 - (c) Submissions filed on behalf of the Fourth Defendant, esp. pars. 78-83;
 - (d) First and Second Defendants' Supplementary Submissions and Materials, in particular submissions under Tab 6 thereto.
18. All parties made oral submissions in relation to the existence or otherwise of the contractual obligation.
19. These written and oral submissions explain the findings of the trial judge at pars. 245-246 of the Revised Reasons.
20. It is appropriate that an appellant bring all issues in contention before the Court of Appeal. It will be for that Court to determine whether or not the contentions are good or bad. An appellant should not be deprived, *in limine*, of bringing its issues before that Court.

No prejudice to the Respondents

21. No prejudice will be occasioned to the Respondents by granting leave to amend the Notice of Appeal. The five day estimate of the hearing of the appeal is not affected. If leave to amend is not granted, there may be considerable prejudice to the thousands of members of the Ground Staff Plan who have been made redundant. If the Trustee is completely successful in the

appeal (assuming the amendment is made) then the Trustee expects that it will be able to pay all benefits in full. If the amendment is not made, the shortfall made need to be addressed in further proceedings, which will involve delay and expense.

Index to the Appeal Book

22. Assuming the amendments sought are made, issue will have to be joined between the parties on the scope of any obligation to pay by Ansett, and on the question of priority. Issue will not have to be joined on the decision of Warren J. that retrenchment benefits were payable.
23. Some material related only to the retrenchment benefit issue, and could be deleted from the Appeal Book. Schedule 2 hereto lists those documents that the Appellant says could be deleted.