

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

AND BETWEEN

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

Cross Appellants

and

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

Cross Respondent

APPELLANT'S RESPONSE TO CROSS APPELLANTS'
OUTLINE OF SUBMISSIONS - 4 AUGUST 2003

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Reference JFA RNF 30-4335111

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SCOPE OF THIS RESPONSE

1. These submissions respond to the cross-appellants' (respondents') Outline of Submissions dated 4 August 2003 on the issues raised in the Notice of Cross-Appeal¹, which is referred to here as the 'Cross-Appellants' Outline'.

FIRST SUBMISSION : ANSETT IS OBLIGED TO MAKE CONTRIBUTIONS IN ACCORDANCE WITH THE FUNDING STANDARD IN SIS REGULATION 9.08

2. The Ground Staff Plan is a regulated superannuation fund.
3. Ansett and the Trustee are bound by the SIS Act and the SIS Regulations.
4. SIS Regulation 9.08 requires Ansett as the employer to pay the certified minimum contributions in FSC5. Ansett is bound directly by SIS Regulation 9.08, as a consequence of the Ground Staff Plan being a regulated fund.² A contravention of SIS Regulation 9.08 is a breach of a statutory obligation.
5. The obligation of Ansett to pay in accordance with SIS Regulation 9.08 is enforceable in a number of ways, and for a number of reasons.
6. The Trustee is obliged by section 34(1) of the SIS Act to ensure that the funding standard in SIS Regulation 9.08 is complied with at all times, on pain of penalties under section 34(2) if it does not. If Ansett refuses to pay, the Trustee must sue Ansett.
7. Section 315 of the SIS Act provides for remedies by way of statutory injunctions for contraventions of the Act. Applying the rule that a failure to comply with regulations made under an Act is generally a failure to comply with the Act under which the regulations are made, a contravention by Ansett of SIS Regulation 9.08 will lead to remedies under section 315. Those remedies are available to the Trustee, APRA, and interested members of the Ground Staff Plan.

Attorney-General (Cth) v Breckler (1999) 197 CLR 83 at 103 [19]

¹ These submissions employ the same abbreviations as those used in the appellant's Outline of Submissions dated 4 August 2003 on the Further Amended Notice of Appeal.

² See *Asgard Capital Management Ltd v Maher* [2003] FCAFC 156 at para 3; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 103 [19]; SIS Act, ss 7, 19. Note that the language in SIS Reg 9.08 is mandatory and unequivocal: 'must'. The intention is to impose an obligation.

Sinclair v Brown Coal Liquefaction (Vic) Pty Ltd [1992] 1 VR 190 at 192

Willingale v Norris [1909] 1 KB 57 at 64, 66, 67

Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73 at 102.

8. Alternatively, SIS Regulation 9.08 imposes an obligation to pay money, which is enforceable by an action in debt. The rule to be applied is that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary. Where the amount is liquidated the action of debt is appropriate.

Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66 at 70

Commonwealth v SCI Operations Pty Ltd (1998) 192 CLR 285 at 305 [40], 313 [65]

Victorian Workcover Authority v Esso Australia Ltd (2001) 207 CLR 520 at 528 [15].

9. There is no contrary intention to exclude an action in debt. Assuming that there is a remedy under section 315, the action in debt is a concurrent remedy.
10. If Ansett refused to comply with SIS Regulation 9.08, and the Trustee failed to sue Ansett, APRA and any interested member of the Defined Benefit Section could apply for a performance injunction under section 315(3) of the SIS Act. The Trustee would be sued for contravention of section 34(1); Ansett would be sued as a moving party for the contravention.
11. Hence, the contention by the respondents that the SIS legislation does not impose an obligation upon Ansett to comply with SIS Regulation 9.08 is not sustainable.

Refer Grounds of Cross Appeal Nos 1 – 7.

Refer Cross-Appellant's Outline, paragraphs 3.1 - 3.9

12. Moreover, SIS Regulation 9.08 is incorporated by reference at two places in the Trust Deed.
13. SIS Regulation 9.08 is a funding standard. The combined effect of the reference to 'standards' in clause 1(1)(b) and clause 1(2) of the Trust Deed is to incorporate

SIS Regulation 9.08 by reference in the Trust Deed, as a standard under the SIS Act and Regulations.³

14. Clause 4(4) of the Trust Deed is a specific incorporation by reference of the whole of Division 9.3 of the SIS Regulations, including SIS Regulation 9.08.
15. A failure by Ansett to comply with SIS Regulation 9.08 is a breach of the contract between Ansett and the Trustee embodied in the Trust Deed which incorporates by reference the provisions of SIS Regulation 9.08.
16. It would be a breach of trust for the Trustee not to sue Ansett for failure to comply with SIS Regulation 9.08. Members of the Ground Staff Plan would sue the Trustee and Ansett.

SECOND SUBMISSION : FSC5 IS A VALID INSTRUMENT THAT ANSETT MUST COMPLY WITH

17. The validity of FSC5⁴ is challenged in the Cross-Appellant's Outline.
18. FSC5 is in conformity with Division 9.3 of the SIS Regulations:
 - (a) The date on which it takes effect is specified (SIS Reg 9.10(1)(a)).
 - (b) No statement was required under SIS Reg 9.11(4) (SIS Reg 9.10(1)(b)).
 - (c) SIS Reg 9.10(1)(c) was complied with: see paragraph 2 of the funding and solvency certification on page 2 of FSC5, together with Appendix A on page 3 of FSC5. [AB Vol 6 C1267]
 - (d) The expiry date was stated (SIS Reg 9.10(1)(c)).
 - (e) There was a certification of solvency at the effective date (SIS Reg 9.10(1)(e)).

³ Cf *Asgard Capital Management Ltd v Maher* [2003] FCAFC 156 at para 3, where it was held that a clause which incorporated so much of the regulations 'that [are] required from time to time to be included in [the] Deed' did not incorporate SIS Regs 6.17(2) and 6.22. The Full Court of the Federal Court held that the standards in SIS Regs 6.17(2) and 6.22 'have effect because of the Supervision Act' ie. the regulations apply by force of statute.

⁴ At the trial Ansett and the administrators attacked FSC4. The conceptions in FSC4 and FSC5 are the same. This outline treats the attack on FSC4 as an attack on FSC5.

- (f) There was a certification of the minimum contributions reasonably expected by the actuary to be required in respect of any member or class of members to secure the solvency of the fund on the expiry date: see Appendix B [AB Vol 6 C 1269] (SIS Reg 9.10(1)(f)).
- (g) SIS Reg 9.19(1)(g) was not applicable.
- (h) FSC5 was signed and dated by an actuary.

19. 'Solvency' is defined by SIS Reg 9.06(2):

In this Division, a reference to the solvency of a fund is to be read as a reference to the minimum benefit index of the fund being certified in accordance with this Division as not less than 1.

20. The 'minimum benefit index' is defined by SIS Reg 9.15(1) :

NRV - BEF

FMRB

- 21. The certification by the actuary in FSC5 that the Ground Staff Plan was not technically insolvent at the effective date of 24 April 2002 was not challenged at the trial ie. it was not disputed that the minimum benefit index was 'not less than 1' as at 24 April 2002.
- 22. The validity of FSC5 is put in issue by paragraphs 4.1 to 4.11 of the Cross-Appellants' Outline.

Refer to Grounds No. 4 - 13 in the Notice of Cross-Appeal.
- 23. Paragraph 4.4 of the Cross-Appellants' Outline is central to the attack on FSC5.⁵ Paragraph 4.4 contains a demonstrable error in analysis where it refers to the calculations that must be

⁵ Footnote 2 (part of par 4.4) is misleading. The minimum requisite benefit is the benefit which the superannuation guarantee legislation and SIS Regulations require to be paid to a member. It does not 'represent' amounts required to be paid by the employer.

carried out by Mr. Francis when considering the minimum benefit index and solvency issues for FSC5.⁶

24. It is stated in paragraph 4.4 of the Cross-Appellant's Outline:

This standard of 'solvency' applicable under Regulation 9.10(1)(f) is solvency as defined in Regulation 9.06(2). This standard requires a calculation by reference to the minimum benefit index. The minimum benefit index is calculated in accordance with Regulation 9.15 of the SIS Regulations. *That calculation is directed to ensuring that assets are sufficient to meet minimum requisite benefits.*

(emphasis added)

25. The statement that the calculation required by the SIS Regulations is 'directed to ensuring that assets are sufficient to meet minimum requisite benefits' is an inaccurate description of what the actuary is required to do. The sense in which the statement is made is that 'sufficient' means 'only sufficient' ie. coverage by the assets of minimum requisite benefits and no more.

26. What the SIS Regulations require is that the actuary must (SIS Reg 9.10(1)(f)):

(f) certify the minimum contributions reasonably expected by the actuary to be required in respect of any member or class of members *to secure the solvency of the fund on the expiry date of the certificate.*

(emphasis added)

27. 'Solvency' does *not* mean 'make sure that the assets are (only) sufficient to meet minimum benefits'; it does not mean that the minimum benefit index must be 1.00.

28. 'Solvency' *refers to* the minimum benefit index being certified in accordance with Division 9.3 as not less than 1. See SIS Reg 9.06(2). An index of 1.00 is not less than 1. So too is an index of 1.1, 1.2 or 1.3 (etc). It is a matter for the judgment of the actuary what the certified minimum contributions should be, and the actuary is entitled to consider all the

⁶ The same error appears in the question asked of Mr Francis at T 510 lines 6 - 10 [AB Vol 2].

circumstances. The reasonable expectation to be certified is for contributions to secure solvency at the expiry date ie. a minimum benefit index of not less than 1. The measure of the contributions is for the judgment of the actuary.

29. In paragraphs 8-9 of their Notice of Cross-Appeal [AB Vol. 13 F15], the Administrators contend that the trial judge erred in not finding that FSC5 is invalid. Paragraph 4 of the Cross-Appellants' Outline is devoted to this contention. In substance, the Administrators contend that FSC5 (and FSC4) is invalid in that the actuary was seeking to establish contributions needed to avoid the fund being in 'an unsatisfactory financial position' within Regulation 9.04 of the SIS Regulations rather than (as he should have) certifying minimum contributions to achieve solvency within the meaning of Regulation 9.03. The contention is based on that part of the text of two letters under the heading 'Basis of Minimum Contributions Proposed': letter dated 13 November 2001 (which accompanied the draft FSC4) [AB Vol 6, C1226] and letter dated 23 January 2002 (which accompanied FSC4) [AB Vol. 6 C1239]. The same matter is referred to in the text of FSC4 [AB Vol. 6 C1244].
30. The contention simply ignores the evidence which Mr Francis gave in explanation of what he had written [AB Vol. 2]. The relevant cross-examination of Mr Francis is at T488-T509. The Administrators did not challenge the truthfulness or the cogency of the explanation.
31. Mr Francis said that two circumstances prevented his being able to identify solvency at '100.0 per cent'⁷ at the expiry date of the certificate: (1) the existing unsatisfactory financial position of the fund (that is that assets did not cover vested benefits) and the pending large, but undetermined, cohort of members who were terminating their membership of the fund and would take with them their entitlements. Mr Francis said that, given his obligation to ensure contributions were sufficient to ensure that solvency was assured at the expiry of the certificate, he targeted an amount which he believed was greater than exactly '100.0 per cent'. His evidence was that, in his letters he was seeking to convey that the contribution program he had designed was not specifically designed 'to target a 100 per cent level of solvency at the end of the day'. Rather, he was setting minimum contributions which would assure solvency at the expiry date of the FSC.

32. The explanation he gave in cross-examination⁸ of what he wrote in his letters is completely consistent with the regulations in that the regulations identify solvency in terms of the minimum benefit index as being 'not less than 1'.
33. Mr Francis is a member of the Institute of Actuaries of Australia, and is subject to the professional requirements in Guidance Note 461 [AB Vol 8 C1810].
34. Paragraph 1.4.2 of Guidance Note 461 refers to 'best estimate minimum contributions', which are those designed in a funding and solvency certificate to only cover minimum requisite benefits at an expiry date. Under paragraph 1.4.4 the actuary is permitted to certify funding at a higher level.
35. The claim is made in paragraph 4.6 of the Cross-Appellants' Outline that:
- By its own terms, FSC5 certifies minimum contributions, which are in excess of those reasonably expected by the Actuary to secure the solvency, as defined by Regulation 9.06(2), of the Ground Staff Plan on the expiry date of the certificate: see Appendix B FSC5.
36. The claim in paragraph 4.6 is misconceived. The reference in Appendix B of FSC5 is to the professional obligations cast upon Mr Francis by Guidance Note 461. The reference does not signify that Mr Francis has ignored SIS Regulation 9.10(1)(f).
37. Paragraph 4.9 of the Cross-Appellants' Outline is objected to:
- (a) The issue raised in paragraph 4.9 is not referred to in the Notice of Cross-Appeal.
 - (b) The trial was conducted on the basis that Membership Group 3 was valid as a category of members or a class of members under SIS Reg 9.10(1)(f).
 - (c) No such submission as in paragraph 4.9 was made to the trial judge in either written submissions dated 8 July 2002 or closing oral submissions by Ansett and

⁷ Mr Francis referred to '100.0 per cent' at several points. See T490 line 29; T492 line 28; T493 line 22, T499 line 15; T503 line 3. As is plain from the context of each of these references, Mr Francis was referring to assets (ie. NRV - BEF) exactly matching minimum requisite benefits; ie. a minimum benefit index of exactly 1. Reg. 9.06(2) defines solvency in terms of 'not less than 1'.

⁸ See transcript T490 lines 14 - 30, T492 line 19 to T493 line 24, T509 lines 27 - 29.

the Administrators. The validity of Membership Group 3 *per se* is accepted in section 5 of the written submission, particularly in paragraph 5.2.33.

- (d) No ruling was made by the trial judge on the issue raised in paragraph 4.9. The numerous references to Membership Group 3 and to FSC4 and FSC5 in the revised reasons for judgment and the final orders indicate that it was common ground that Membership Group 3 was unobjectionable *per se*. So too the holding by the trial judge that Ansett was obliged to make contributions in accordance with the whole of FSC5.

See revised reasons for judgment paragraphs 89, 124, 296, 279, 369, 370, 374 and 378.

- (e) The definition of 'Membership Group 3' in the Notice of Cross-Appeal indicates the novelty of this point:

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

(emphasis added)

Moreover, the existence of Membership Group 3 is referred to without complaint in Grounds of Cross-Appeal No. 12 and 13.

38. In any event, the contention in paragraph 4.9 is fallacious in that it conflates various references to the terms 'Member' and 'membership'. The minimum contributions identified in FSC4 and FSC5 are in respect of a 'class of members'. The class comprises those members who will be (standard employer-sponsored) members of the fund at the expiry date of the FSC. Minimum contributions must be certified in respect of them. The quantum of those contributions is identified by reference to a formula (ie. 'Membership Group 3') which (a) takes into account amounts which will have been paid to members who are former members as at the expiry date of the FSC and (b) requires the fund to be 'replenished' by reference to those amounts.

39. Paragraph 4.10 of the Cross-Appellants' Outline is misconceived:
- (a) a funding and solvency certificate is an instrument that has practical effect, and it is not tenable to claim that practical matters must be ignored by an actuary;
 - (b) the trial judge was not making rulings on credit, but she was entitled to hear evidence from an actuary and to take into account that no competing or contradictory approach for FSC4 (or FSC5) was proposed to by an expert actuary called by Ansett and the administrators (no such expert was called);
 - (c) the reference to 'what the Actuary said he did' in the third sentence belies the omission of the Cross-Appellants' to take into account the evidence of Mr Francis in cross examination;
 - (d) an alternative method of continual monitoring was considered and rejected by Mr Francis as impractical and making no difference in any event: transcript T496 lines 1 - 11; T509 lines 27 - 29.
40. Paragraph 4.11 of the Cross-Appellants' Outline is misconceived. The first and second defendants claimed that the judgment of Mr Francis was wrong, which is a challenge to the exercise of judgment by an expert. An affidavit by another expert actuary to say that the judgment was wrong or unwarranted would have been admissible. The failure to produce such an affidavit is a matter that the trial judge was entitled to consider.
41. This outline has not addressed the claims in paragraphs 2.3(d) and 2.3(e) of the Cross-Appellants' Outline. There are no such claims in the Notice of Cross-Appeal. It is not clear how their claims are being put. *Prima facie* they contradict the holdings made in paragraphs 245 - 246 of the revised reasons for judgment.
42. The attack upon the validity of FSC5 gains whatever strength it has by ignoring the injunction in *Minister for Immigration and Ethnic Affairs v. Wu Shan Ling* (1996) 185 CLR 259, at 271-272 (per Brennan CJ, Toohey, McHugh and Gummow J) and 290-293 (Kirby J). According to the headnote:

The reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

Dated 6 August 2003

JG Santamaria

DM Maclean

PD Crutchfield