

**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

OUTLINE OF SUBMISSIONS

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In this outline of submissions:

'Actuary' refers to Paul Daniel Francis, the actuary for the Ground Staff Plan.

'Administrators' or 'Messrs Mentha and Korda' refers to Mark Francis Xavier Mentha and Mark Anthony Korda, voluntary administrators of Ansett appointed on 17 September 2001.

'Ansett' refers to Ansett Australia Ltd (subject to deed of company arrangement).

'FSC3' refers to the third Funding and Solvency Certificate for the Ground Staff Plan, issued on 29 May 2001 [AB Vol 6 C1208].

'FSC4' refers to the fourth Funding and Solvency Certificate for the Ground Staff Plan, issued on 23 January 2002. [AB Vol 6 C1241]

'FSC5' refers to the fifth Funding and Solvency Certificate for the Ground Staff Plan, issued on 24 April 2002. [AB Vol 6 C1266]

'Ground Staff Plan' or 'Plan' refers to Ansett Australia Ground Staff Superannuation Plan.

'Membership Group 3' refers to the Membership Group described as such in Appendix B to each of FSC4 and FSC5, in respect of which the certified minimum contributions were 'A lump sum amount determined as (the amount of the member's Retrenchment Benefit minus the amount of the member's resignation benefit) divided by 0.85'.

'Relevant Date' means 12 September 2001.

'Revised reasons for judgment' refers to the revised reasons for judgement of Warren J. dated 7 February 2003.

'SIS Act' refers to the *Superannuation Industry Act (Supervision) Act 1993*.

'SIS Regulations' refers to the *Superannuation Industry (Supervision) Regulations 1993*.

'Special Funding and Solvency Certificate' refers to the Certificate so described issued by the Actuary on 25 March 2003.

'Trustee' refers to the appellant as the Trustee of the Ground Staff Plan.

'Trust Deed' refers to the Ansett Australia Ground Staff Superannuation Plan 1999 Consolidated Trust Deed dated 17 August 1999 [AB Vol 4 C276].

SCOPE OF THIS OUTLINE

1. This is the appellant's outline of submissions upon the matters raised in the Amended Notice of Appeal dated 24 June 2003, and in the Notice of Contention dated 11 April 2003.
2. This outline does not address the matters raised in the Notice of Cross-Appeal dated 7 April 2003.

3. The appellant will prepare an outline of submissions in response to the respondents' outline upon the matters raised in their Notice of Cross-Appeal.

**FIRST SUBMISSION : ANSETT'S OBLIGATIONS TO MAKE THE CONTRIBUTIONS
FOR MEMBERSHIP GROUP 3 IN FSC5
QUALIFY AS EXPENSES INCURRED UNDER S.556(1)(a) OR S.556(1)(dd) OF THE
CORPORATIONS ACT 2001.**

Introductory Matters

4. The Ground Staff Plan is a regulated superannuation fund.
5. The Trustee and Ansett are bound by the SIS Act and SIS Regs.

SIS Act, sections 7, 19
Attorney-General (Cth) v Breckler (1999) 197 CLR 83 at 103[19]
Asgard Capital Management Ltd v Maher [2003] FCAFC 156 at para [3]
6. Ansett is bound by the funding standard in SIS Reg 9.08 to pay at least the certified minimum contributions in FSC5, which is a funding and solvency certificate issued by the Actuary under Division 9.3 of the SIS Regs.

SIS Act, section 31
7. Further, clause 1(1)(b) and 1(2) of the Trust Deed incorporate by reference all SIS Act standards, including SIS Reg 9.08.
8. Further, clause 4(4) of the Trust Deed has incorporated by reference the whole of Division 9.3 of the SIS Regs, including SIS Reg 9.08.
9. For the purposes of this appeal the material instrument is FSC5.
10. Ansett's obligation to make contributions for Membership Group 3 in FSC4 was conditional upon the Trustee being advised by the trial judge that members made redundant

were entitled to retrenchment benefits under Rule 1.13. FSC4 lapsed before that advice had been received, and accordingly Ansett's obligation to make contributions for Membership Group 3 did not become unconditional before the lapse of FSC4. The obligation of Ansett to make contributions for Membership Group 3 under FSC5 became unconditional during its period of effect.¹

11. The appellant's understanding is that there are sufficient assets in Ansett to enable it to be paid in full under FSC5 regardless of whether it succeeds under section 556(1)(a) or section 556(1)(dd) of the *Corporations Act* 2001.

¹ An alternative view is that FSC4 applies to retrenchments after 12 September 2001 and before it lapsed on 24 April 2002, and that FSC 5 applies to all retrenchments between 24 April 2002 and its lapse on 24 March 2003. This view leads to a different form of order if the appeal is successful, but otherwise leads to the same result as if FSC5 were the governing instrument.

SUBMISSIONS ON PRIORITY

12. In general, expenses in a winding-up that are properly incurred after the relevant date attract priority under section 556(1)(dd) of the *Corporations Act* 2001. Where the expense has the additional quality that it was incurred in preserving, realising or getting in property of the company, or in carrying on the company's business, then it attracts priority under section 566(1)(a).
13. The key statutory phrase is 'expenses properly incurred (by an administrator)'. The phrase embraces expenses incurred by the administrator as agent for the company in circumstances in which the administrator has no personal liability in respect of the obligation: *Bell v. Amberday Pty Ltd* (2001) 39 ACSR 25 at 37.
14. The phrase 'expenses incurred' in the context of a winding up embraces both those obligations which are voluntarily undertaken by the liquidator (such as the wages of employees or the price of goods) and those obligations which are imposed during the course of the winding up (such as taxes, rates, licence fees and other levies): *In re Benifelkai Mining Corporation, Ltd* [1934] Ch. 406 at 418-419 (assessment of taxes made after the relevant date), *In re Wenborn & Co* [1905] 1 Ch. 414 (costs payable by an unsuccessful liquidator in litigation commenced against the company prior to the liquidation but thereafter continued by him), *Deputy Commissioner of Taxation v. Tideturn Pty Ltd* (2001) 37 ACSR 152 (group tax deductions pursuant to the ITAA 1936).²
15. Over recent years, the range of external administrations has increased and the scope of their functions is much broader³. A broad interpretation of the phrase 'expenses incurred' is appropriate when dealing with a regime which allows a company to trade on under external administration. This is particularly so where there are obligations for which administrators are not personally liable⁴.

² See also *Explanatory Memorandum Corporate Law Reform Bill 1992* at paragraph 908-909 and Keay, McPherson *The Law of Company Liquidation* (4th ed) at 588-589. See also paragraph 286 of the revised reasons for judgment.

³ See definition of 'externally-administered body corporate' in section 9 of the *Corporations Act 2001*.

⁴ *HIH Insurance Ltd. (in liq)* [2001] 39 ACSR 645.

16. Ansett's obligations to make contributions for Membership Group 3 under FSC4 and FSC5 are expenses for the purposes of either section 556(1)(a) or (dd) of the *Corporations Act 2001*.
17. The reasons are :
- (a) These are post relevant date expenses incurred by way of FSC5 under SIS Reg 9.08.
 - (b) The liability of Ansett to make contributions for Membership Group 3 in FSC5 can be traced back to FSC4, but every material date and event is post the relevant date.
 - (c) For FSC4, the effective date was 23 October 2001, the issue date was 23 January 2002 and the retrenchments the subject of Membership Group 3 were after 12 September 2001.
 - (d) For FSC5, the effective date was 24 April 2002, the issue date was 24 April 2002, the retrenchments the subject for Membership Group 3 were after 12 September 2001, and the advice to the Trustee of the entitlements of members made redundant to retrenchment benefits was received long after the issue of FSC5.
 - (e) The obligations under FSC5 are obligations imposed by statute that were incurred by Ansett after the relevant date. These kinds of obligations have generally been accorded priority under the equivalents of section 556(1)(a) or (dd), or variations on the theme, depending on whether they count as expenses incurred only, or as expenses incurred in (for example) realising or getting in the assets. It would be anomalous for statutory superannuation obligations not be treated in the same way as rates, taxes, licence fees and the like.

In re Beni-Felkai Mining Corporation, Ltd [1934] Ch 406

In re Mesco Properties [1980] 1 WLR 96; [1980] 1 All ER 117

In re Toshoku Finance UK plc [2002] 1 WLR 671; [2002] 3 All ER 961

In re Blazer Fire Lighter, Ltd [1895]1 Ch 402 (approved in *In re Toshoku Finance UK plc* at 680-1)

In re Mineral Resources Ltd [1999] 1 All ER 746 (approved in *In re Toshoku Finance UK plc* at 680-1)

Deputy Commissioner of Taxation v Tideturn (2001) 37 ACSR 152

Compare:

In re Kentish Homes Ltd [1993] BCLC 1375 (overruled in *In re Toshoku Finance UK plc* at 682-3)

- (f) The FSC obligations are part of the same statutory system as the superannuation guarantee charge. Pre-relevant date charge comes under section 556(1)(e), per section 52 of the *Superannuation Guarantee (Administration) Act*. Post-relevant date superannuation guarantee charge must come under section 556(1)(dd) or section 556(1)(a). It would be anomalous for unpaid charge to attract priority and for unpaid certified minimum contributions under FSC5 not to attract priority.
- (g) There is no sensible distinction between the result in *Re Matthew Bros (in liq)* [1962] VR 262 and the result sought by the appellant.
- (h) Expenses can be incurred for section 556(1)(a) or (dd) notwithstanding that there is a pre-relevant date contractual or statutory framework.⁵

See the cases cited under paragraph 17(e) above.

Compare *Re Matthew Bros (in liq)* [1962] VR 262

⁵ In the different context of insolvent trading, directors have been held liable notwithstanding that the liabilities related to antecedent contracts (*ASIC v Plymin* [2003] VSC 123 at paragraphs [515] to [517]; *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290 at 314). So too in the context of the imposition of personal liability upon receivers (*McMahon's (Transport) Pty Ltd v Ebbage* [1999] 1 Qd R 185). *A fortiori*, where the issue is whether expenses have been incurred under section 556(1)(a) or (dd).

- (i) No obligation had been incurred by Ansett as at or prior to the relevant date. As at the relevant date Ansett had no FSC obligation to fund for further redundancies. There were numerous uncertainties: FSC3 was in operation and may have been the last FSC; whether the Plan would continue for more than one month or so after the relevant date was uncertain; what the future claims on the Plan would be was uncertain; the future value of the assets of the Plan would be uncertain; stock market fluctuations were unpredictable; cash injections from third parties (Air New Zealand) were not foreseeable; the administrators had the power to close the Plan.

Fisher v Madden (2002) 41 ACSR 1 (liability at the relevant date too undeveloped to constitute a contingent liability).

Re Matthew Bros (in liq) [1962] VR 262 (rights merely inchoate at the relevant date).

- (j) Messrs Mentha and Korda will be entitled to claim their expenses in acting as principal employer for the Plan under either section 556(1)(a) or under section 556(1)(dd) on the basis that those expenses are properly incurred in carrying on business etc. FSC5 is also an expense under section 556(1)(a) or section 556(1)(dd) for Messrs Mentha and Korda.

Re Mineral Resources Ltd [1999] 1 All ER 746 at 764 (liquidator entitled to claim as expenses the costs of complying with a statutory waste management licence that belonged to the company).

Compare *Re Berkeley Applegate (Investment Consultants) Ltd (No.3)* (1989) 5 BCC 803 at 805 (remuneration, costs and expenses of liquidator for administering trust assets which are not the assets of the company are not expenses incurred in the winding up).

Note that the trial judge held (and the Administrators accepted) that the contributions for Membership Group 1 fell under section 556(1)(a). See paragraph 148 of the revised reasons for judgment.

- (k) It would be anomalous for post relevant date wages to obtain priority, and for superannuation contributions not to: cf section 556(1)(e).

Re Matthew Bros (in liq) [1962] VR 262 at 265-6 (wages after the relevant date are part of costs charges and expenses of and incidental to the winding up).

- (l) There is no sound reason to determine that there is priority for Membership Group 1 under section 556(1)(a), but not for Membership Group 3.

See the trial judge's response to paragraph 14(a) of the Fourth Amended Originating Motion in the final orders of 7 February 2003.

- (m) Messrs Mentha and Korda will be entitled to pay as expenses any statutory fees for certificates needed for an airline⁶. For example, for the Air Operator's Certificate required for flying operations in Australia unpaid fees are recoverable by CASA as a debt. There is no provision referring to liquidators or administrators.

Civil Aviation Act 1998, sections 27, 97AA, 98(3)(a)

Civil Aviation (Fees) Regulations, Schedule, Item 5.1

- (n) Messrs Mentha and Korda will be entitled to pay as expenses Victorian local government rates and charges. There is no provision referring to liquidators or administrators.

Local Government Act 1958, sections 156, 180

Note Ansett's ownership of freehold property in Victoria: page 36 of the First Report to Creditors [AB Vol 9 C1915].

⁶ Note the reference inter alia to the Air Operator's Certificate in the attempted sale to Tesna Pty Ltd at [AB Vol 9 C1928]

- (o) Note that this first submission does not depend on the rule in *Re Lundy Granite Co* (1871) LR 6 Ch App 642, which is not applied to expenses imposed by statute.

See *In re Toshoku Finance UK plc* [2002] WLR 671 at 682-683, overruling *In re Kentish Homes Ltd* [1993] BCLC 1375.

- (p) Note that this first submission is independent of any submission based on the contract of employment.

**WHETHER ORDERS SHOULD BE MADE UNDER SECTION 556(1)(a) OR
SECTION 556(1)(dd)**

18. The Administrators carried on the business of Ansett after the relevant date⁷, and took steps to sell the assets of the business. The continuation of the Ground Staff Plan after the relevant date was part of the ongoing management of the business of Ansett.⁸ These matters tend to support orders being made under section 556(1)(a) for all of the expenses incurred under FSC5. (If these matters do not carry section 556(1)(a), section 556(1)(dd) applies to the whole of FSC5.)

ERRORS OF THE TRIAL JUDGE IN THE CONSTRUCTION OF SECTION 556(1)

19. The trial judge made a number of errors in the construction of section 556(1).
20. It is wrong to construe section 556(1)(a) as being incapable of including superannuation obligations incurred by Ansett *after* the relevant date, just because superannuation contributions in respect of services rendered *before* the relevant date are expressly afforded priority under section 566(1)(e).

See paragraph 293 of the revised reasons for judgment.

Refer Ground of Appeal No. 3.

⁷ Albeit on a reduced scale. See revised reasons for judgment, paras 1-7, 298-300;

21. It is wrong to construe section 556(1)(dd) as being incapable of including superannuation obligations incurred by Ansett after the relevant date.

See paragraph 293 of the revised reasons for judgment and compare paragraph 301.

Refer Ground of Appeal No. 3.

22. It is wrong to construe section 556(1)(a) as including the contributions for Membership Group 1, and as excluding the contributions for Membership Group 3.

See the trial judge's response to paragraph 12(a) of the Fourth Amended Originating Motion in the final orders of 7 February.

Refer Grounds of Appeal Nos 4 and 5.

23. It is wrong to construe section 556(1)(a) as applying only to recurrent expenses 'analogous to rent'. Expenses under section 556(1)(a) could be, for example, recurrent, non-recurrent or of an income or capital nature. There is no limitation expressed in section 556(1)(a). The same applies to section 556(1)(dd).

See paragraph 371 of the revised reasons for judgment.

Refer Grounds of Appeal Nos 6 and 7.

24. It is wrong to construe section 556(1)(a) as not including the case where a business is carried on after the relevant date on a smaller scale.

See paragraphs 286 and 300 of the revised reasons for judgment.

Refer Ground of Appeal No. 10

⁸ *In re Edgar* [1972] ACLC 40-064; *Denny v Yeldon* [1995] 3 All ER 624. The Administrators did not exercise power under clause 2 of the Trust Deed to close the Plan.

25. The trial judge held that the contributions for Membership Group 3 were contingent claims at the relevant date, and did not come within section 556(1)(e), but section 556(1)(e) does include contingent claims.

See paragraphs 373, 378 and 301 of the revised reasons for judgment.

Refer Grounds of Appeal No. 19 and 20.

26. The charter for administrators in section 435A of the *Corporations Act* 2001 is not assisted by a narrow meaning being given to section 556(1)(a) or section 556(1)(dd). The trial judge has expressed various limitations so as to give a narrow meaning to these provisions.

SECOND SUBMISSION : THE OBLIGATION OF ANSETT TO MAKE CONTRIBUTIONS UNDER THE CONTRACT OF EMPLOYMENT

27. The contractual obligation as held by the trial judge is to make contributions to the Trustee of whatever is necessary in order to fund the payment of benefits in full.

See paragraphs 245 and 246 of the revised reasons for judgment.

28. There is substantial machinery in the FSC system to facilitate the provision of funding. No resort to the contractual term need be made before the exhaustion of the mandatory requirements on Ansett under the SIS Act and SIS Regs.
29. To any extent that the contractual obligation is required to 'top-up' what is needed after the deployment of the FSC system, that 'top-up' will be an expense under section 556(1)(a).
30. The 'top-up' obligation was inchoate as at the relevant date since:
- (a) The scale of any future retrenchments was unknown, and yet to occur.
 - (b) Existing FSC3 did not require any substantial funding to pay for future retrenchment.

(c) There was the possibility of the Plan being closed forthwith, even before redundancies were made, and before the issue of FSC4.

(d) The state of the assets of the Plan post-relevant date was impossible to know.

31. The trial judge erred in finding that the contract of employment obligation was *semble* commensurate with the FSC obligation. Her formulation of the obligation means that it extends to whatever it needs to pay benefits in full, in whatever the circumstances may be.

See paragraph 246 of the revised reasons for judgment.

Dated 4 August 2003

JG Santamaria

DM Maclean

PD Crutchfield