

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

No. 2115/01

BETWEEN:

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

Appellant
(Plaintiff)

and

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

Respondents
(Defendants)

AND BETWEEN:

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

Cross Appellants
(Defendants)

and

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

Cross Respondents
(Plaintiff)

**OUTLINE OF SUBMISSIONS ON BEHALF OF
CROSS APPELLANTS (DEFENDANTS)**

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1. The cross appeal

- 1.1 By notice of cross appeal dated 7 April 2003, Ansett Australia Limited (subject to Deed of Company Arrangement) ("Ansett"), Mark Anthony Korda and Mark Francis Xavier Mentha ("the Administrators"), the cross appellants,

have cross appealed against the order made by the Honourable Justice Warren on 7 February 2003 in response to paragraph 12(a) of the fourth originating motion between parties dated 20 February 2003 (“the originating motion”).

- 1.2. By paragraph 12 of the originating motion, Ansett Australia Ground Staff Superannuation Plan Pty Ltd (“the Trustee”), the cross-respondent, sought a declaration as to whether Ansett is obliged to make further contributions, and, if so, what further contributions, to the Ground Staff Superannuation Plan (“the Ground Staff Plan”).
- 1.3. By orders made on 7 February 2003, her Honour ordered, in response to paragraph 12(a), that:

“Ansett Australia Limited (subject to Deed of Company Arrangement) (ACN 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.”

- 1.4. The reference in the order to a Funding and Solvency Certificate is a reference to a certificate issued by the actuary of a defined benefit fund pursuant to Division 9.3 of the *Superannuation Industry (Supervision) Regulations* 1994 (“SIS Regulations”). The reference to FSC5 is a reference to the Funding and Solvency Certificate issued by the Actuary of the Ground Staff Plan dated 24 April 2002 [AB Vol 6 C1265]. The references to Membership Groups 1, 2 and 3 are references to the group members identified as such in Appendix B to FSC5.

2. **The obligation to make further contributions**

- 2.1. At paragraph 378 of her revised reasons for judgment dated 7 February 2003 (“the revised reasons for judgment”), Justice Warren summarised her core findings as to the obligation of Ansett to make further contributions as follows:

- “1. ...
2. *Pursuant to the superannuation statutory regime and the Trust Deed, Ansett is obliged to make contributions in accordance with the Funding and Solvency Certificate known as “FSC5”.*
 3. *The said obligation arises, also, from the contract of employment between Ansett and its employees who were members of the Ground Staff Plan.*
 4. *The Funding and Solvency Certificate known as FSC5 is valid and a shortfall has arisen that is required to be met pursuant to the obligations upon Ansett.”*

2.2 The reference to the “superannuation statutory regime” is a reference, in particular, to Regulation 9.08 of the SIS Regulations [see paragraphs 42 and 242 of the revised judgment]. The reference to the Trust Deed is a reference to clause 4(4) of the Ansett Australia Ground Staff Superannuation Plan 1999 Consolidated Trust Deed made 17 August 1999 (“the Trust Deed”) [**AB Vol 3 C276**] [see paras. 81 and 242 of the revised judgment].

2.3 In summary, Ansett and the Administrators’ position in relation to the obligation to make further contributions is:

- (a) Ansett is under an obligation to make further contributions to the Ground Staff Plan pursuant to clause 4(4) of the Trust Deed;
- (b) the obligation arising under clause 4(4) is an obligation to make contributions in accordance with the solvency requirements of Division 9.3 of the SIS Regulations. The solvency requirements of Division 9.3 require Ansett to contribute the minimum contributions required to secure the solvency of the fund, as certified in a Funding and Solvency Certificate prepared in accordance with the requirements of the SIS Regulations;
- (c) no separate obligation to make further contributions arises from the SIS legislation per se, as distinct from the obligation arising by the

incorporation of the requirements of Division 9.3 into the Trust Deed by clause 4(4);

- (d) an obligation to make further contributions pursuant to the individual contracts of employment may arise by the express incorporation of the terms of the Trust Deed into an individual employment contract;
- (e) the measure of the obligation arising under an individual contract of employment incorporating the terms of the Trust Deed is one which is commensurate with that arising directly from the Trust Deed, that is, it is an obligation to contribute the minimum contributions required to secure the solvency of the fund, as certified in a Funding and Solvency Certificate prepared in accordance with the requirements of Division 9.3 of the SIS Regulations;
- (f) FSC5 is invalid as it was not made in compliance with Division 9.3 of the SIS Regulations and accordingly, there is no obligation on Ansett to make the further contributions required by it.

3. The learned trial judge erred in finding that Ansett is under an obligation pursuant to the Superannuation Industry (Supervision) legislation to make a contribution to the Ground Staff Plan to achieve solvency [grounds 1-3].

- 3.1 To the extent that the learned trial judge's revised reasons for judgment suggest that Regulation 9.08 of the SIS Regulations imposes a separate obligation (as distinct from that arising under the Trust Deed) on Ansett to make further contributions to the Ground Staff Plan, the learned trial judge erred [see paras. 42, 81, 239-242, 246 of the revised reasons for judgment].
- 3.2 Regulation 9.08 of the SIS Regulations relevantly provides that, in respect of each year of income of a defined benefit scheme, an employer-sponsor must pay contributions to the fund, which are not less than the "minimum

contributions” certified in accordance with Regulations 9.10(1) in a Funding and Solvency Certificate (see Reg. 9.06 SIS Regulations).

- 3.3 The certified minimum contributions in a Funding and Solvency Certificate are “the minimum contributions reasonably expected by the actuary to be required in respect of any member or class of member to secure the solvency¹ of the fund on the expiry date of the certificate”: Reg. 9.10(1)(f) SIS Regulations.
- 3.4 Division 9.3 of the SIS Regulations, of which Regulation 9.08 forms part, is made pursuant to s.31 of the *Superannuation Industry (Supervision) Act 1993* (“SIS Act”). Section 31 provides that “the regulations may prescribe standards applicable to the operation of regulated superannuation funds”.
- 3.5 It is submitted that Regulation 9.08 of the SIS Regulations does not impose a liability on an employer-sponsor to contribute in accordance with the minimum contributions certified in a Funding and Solvency Certificate, it sets a standard for regulated superannuation funds: Reg. 9.07 SIS Regulations.
- 3.6 The obligation to comply with the prescribed standards in Division 9.3 of the SIS Regulations, including Regulation 9.08, is imposed solely and exclusively on the trustee of a defined benefit fund: s. 34 SIS Act. The learned trial judge accepted that this was so at para. 33 of the revised reasons for judgment.
- 3.7 No enforcement procedure is prescribed by the SIS Act or the SIS Regulations for Regulation 9.08. The effect of the failure of an employer-sponsor to pay the minimum contributions in accordance with Regulation 9.08 is that the Funding and Solvency Certificate relating to the defined benefit fund ceases to have effect (Reg. 9.12 (2)(d)), requiring the trustee to obtain another certificate (see Regs. 9.13 and 9.14) and possible further consequences thereafter (see Regs. 9.16-9.19 and Division 4 SIS Regulations).

¹ The issue of “solvency” for the purposes of Division 9.3 of the SIS Regulations is addressed at paras. 4.4-4.5 below.

- 3.8 The trustee of a defined benefit fund may ensure compliance with Regulation 9.08, in accordance with s. 34 of the SIS Act, by imposing a contractual obligation on the employer-sponsor to contribute in accordance with the terms of the standard: see Brown R.M. & Edstein J. *Superannuation Practice – Commentary* (looseleaf) at [400-310]; see also *Attorney-General (Commonwealth) v Breckler* (1999) 197 CLR 83 at [13], [14], [38], [39], [43], [44] and [67].
- 3.9 The Trustee has imposed such an obligation upon Ansett by clause 4(4) of the Trust Deed. Clause 4(4) provides that contributions in respect of the defined benefit section of the Ground Staff Plan “will not be less than is required by the solvency requirements of the Act”.
4. **The trial judge erred in finding that Ansett is obliged to make further contributions in accordance with the requirements of FSC5 [grounds 4-13]**
- 4.1 The learned trial judge erred in finding that the minimum contributions in FSC5 were certified in accordance with the requirements of Division 9.3 of the SIS Regulations and that Ansett was obliged to make further contributions in accordance with it [see paras. 44, 86-93, 123, 131, 153, 240-242 of the revised reasons for judgment].
- 4.2 The obligation to make further contributions whether arising pursuant to clause 4(4) of the Trust Deed or Regulation 9.08 per se, is an obligation to make contributions in accordance with the solvency requirements of Division 9.3 of the SIS Regulations.
- 4.3 The solvency requirements of Division 9.3 relevantly require an employer-sponsor to pay the “minimum contributions”, certified in accordance with Regulation 9.10 of the SIS Regulations in a Funding and Solvency Certificate.
- 4.4 The 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 benefits². (The reason the standard is referable only to minimum requisite benefits is because the purpose of the SIS Regulations is to ensure that security of those benefits attributable to compulsory superannuation guarantee contributions: see Explanatory Statement to the SIS Regulations quoted at para. 30 of the revised reasons for judgment).

- 4.5 The standard of solvency in Regulation 9.06(2) is to be contrasted with the standard of “unsatisfactory” financial position in Regulation 9.04 for the purposes of the reporting provisions of s. 130 of the SIS Act.
- 4.6 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 (see also **AB Vol 2 T503** and para. 90 revised reasons for judgment).
- 4.7 The minimum contributions certified in respect of Membership Group 3 in FSC5 were certified by reference to the standard referable to “unsatisfactory” financial position in Regulation 9.04 rather than by reference to the standard of solvency in Regulation 9.06(2) of the SIS Regulations. The Actuary stated this to be so at the time³:

“The Act addresses solvency as noted above (assets covering Minimum Requisite Benefits), but also addresses the situation where net assets do not cover Vested Benefits, referring to this as an “unsatisfactory financial position”... the solvency being sought by the minimum

² The minimum requisite benefit is the benefit which represents the amount required to be paid by the employer by the *Superannuation Guarantee (Administration) Act 1992* (“SGA Act”) and *Superannuation Guarantee (Charge) Act 1992*, either by way of contribution to the Plan or by payment of the charge, in respect of each employee. (see reg. 1.03 SIS Regulations (“minimum requisite benefit”); ss. 10, 16, 19, 20 and 22 SGA Act ; regs. 2, 3, 4 and 6 *Superannuation Guarantee (Administration) Regulations 1993*; ss. 5 and 7 *Occupational Standards Act 1987* and regs. 3 and 8 *Occupational Standards Regulations*

³ The relevant letter is referring to the minimum contributions which were certified in FSC4 made 23 January 2002 with an effective date of 23 October 2001, which were identical to those later certified in FSC5.

contributions certified in this certificate is solvency in its broader sense as noted above, and not solvency as defined particularly in SIS Regulation 9.06(2)."

[**AB Vol 6 C1239**; see also **AB Vol 6 C1226**, **AB Vol 2 T488-90**, **T501**]. The standard in Regulation 9.06(2) is lower than that in Regulation 9.04 [**AB Vol 2 T486-7**].

- 4.8 Guidance Note 461 issued by the Institute of Actuaries of Australia [**AB Vol 8 C1810**] was relied upon to justify this course (see **AB Vol 1 B30**, **AB Vol 2 T491**, **T493-4**). It is submitted that the Guidance Note does not permit the Actuary to depart from the requirements of Regulation. 9.10 of the SIS Regulations in the preparation of a Funding and Solvency Certificate. Alternatively, Guidance Note 461 did not justify the course taken in the circumstances here: [**AB Vol 1 B162**, **AB Vol 2 T494**].
- 4.9 The Actuary's erroneous approach is further revealed by his reference to "Membership Groups" in FSC5. It is submitted that the minimum contributions certified in respect of Membership Group 3 in FSC5 were not certified "in respect of any member or class of member": Reg. 9.10(1)(f). A retrenched employee is not a "member" as defined: see Reg. 1.03 ("Member"), and Schedule 1, Rule 1.1 ("Member") of the Trust Deed (see also par. 241 of the revised reasons for judgment).
- 4.10 It is submitted that in determining whether FSC5 was made in accordance with Division 9.3 of the SIS Regulations, the learned trial judge erred in treating the question as one of practicality (or perhaps credit) [see para. 242 of the revised reasons for judgment]. The issue is properly to be determined by reference to the SIS Regulations and what the Actuary said he did.
- 4.11 Further, it is submitted that the learned trial judge erred in treating the fact that no expert evidence was called to contradict the evidence given by the Actuary of the Ground Staff Plan as relevant to the question whether FSC5 was made in accordance with Regulation 9.10(1). [see para. 242 of the revised reasons for judgment].

S P WHELAN

B M McMAHON

4 August 2003