

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

AFFIDAVIT OF ANTHONY LEIGH MIDDLETON

Date of document 15 April 2003

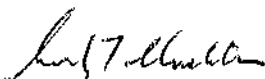
Filed on behalf of the appellant

Prepared by
MINTER ELLISON
Lawyers
Rialto Towers
525 Collins Street
MELBOURNE VIC 3000

Solicitors Code 8510
DX 204 MELBOURNE
Telephone (03) 8608 2642
Facsimile (03) 8608 1000
Reference JFA RNF 30-4185285
Ross Freeman

I, **ANTHONY LEIGH MIDDLETON** of 5 Kelburn Street, North Caulfield, Victoria, am a director of the abovenamed appellant and I am authorised by the appellant to make this affidavit on its behalf. I do solemnly and sincerely affirm that:

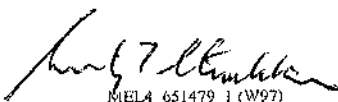
1. Except where I otherwise indicate, I make this affidavit from my own knowledge.
2. The appellant is the trustee ('Trustee') of the Ansett Australia Ground Staff Superannuation Plan ('Plan'). The second respondents ('Administrators') were appointed administrators of the first respondent, Ansett Australia Limited ('Ansett') and related companies on 17 September 2001. On 2 May 2002 the Administrators executed a deed of company arrangement covering the Ansett group of companies ('Ansett DOCA').



MEL4_651479_1 (W97)



3. The Trustee commenced this proceeding on 21 December 2001. Justice Warren delivered her judgment on 20 December 2002. Revised reasons were delivered and final orders made on 7 February 2003. Now produced and shown to me marked 'ALM-1' and 'ALM-2' respectively are copies of the revised reasons and orders dated 7 February 2003.
4. Justice Warren came to three principal conclusions:
- (a) That all of the Plan members who had been made redundant by the administrators of Ansett were entitled to retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed for the Plan (as opposed to benefits under Rule 1.12, being the benefits payable to any member on leaving the service of Ansett) (paragraph 378(1) of the revised reasons for judgment). The significance of this finding was that, in general, retrenchment benefits are greater than benefits on leaving service only (referred to as the resignation benefits), and lead to a greater call for contributions from the employer, Ansett, in order that benefits can be paid.
- (b) That the Funding and Solvency Certificates issued by the Plan's Actuary, Mr Paul Francis, on 23 January 2002 and 24 April 2002, pursuant to the requirements of in the *Superannuation Industry (Supervision) Act 1993* and Regulations, were valid and enforceable (paragraphs 86-93 and 240-242 of the revised reasons for judgment). The significance of this finding is that Mr Francis in his Certificates required Ansett to pay to the Trustee the difference between each member's resignation benefit and retrenchment benefit, where the member was entitled to a retrenchment benefit and it was greater than the resignation benefit. A related finding was that the terms of the standard Ansett contract of employment (between Ansett and any Plan member) led to the conclusion that there was a 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 (paragraphs 245-6 of the revised reasons for judgment).
- (c) That the Trustee did not have any status as a priority creditor under subsections 556(1)(a), (c), (dd) or (e) of the *Corporations Act 2001* for the amounts described under the Funding and Solvency Certificates as the difference (for each member made redundant, as applicable) between


MELA_651479_1 (W97)



resignation and retrenchment benefits. A related finding was that the regular, 9% of salary contributions required of Ansett by the Funding and Solvency Certificates did have priority under s 556(1)(a).

5. On 20 February 2003, by consent of all parties, Justice Warren granted an extension of time for the filing of any notice of appeal until 24 March 2003. The Trustee filed a notice of appeal on 24 March 2003. Now produced and shown to me marked 'ALM-3' is a copy of the notice of appeal. In general terms, the Trustee seeks orders that it has priority under one or more of sections 556(1)(a), (dd) or (e) of the *Corporations Act* 2001.
6. On 7 April 2003 the respondents cross-appealed. Now produced and shown to me marked 'ALM -4' is a copy of the notice of cross-appeal. In general terms, the respondents seek orders that Ansett is not obliged 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. On 11 April 2003, the respondents filed a notice of contention, a copy of which is now produced and shown to me marked 'ALM -5'.
7. The parties are concerned to obtain a determination of the issues in the appeal and the cross-appeal as soon as possible. The Trustee, supported by the respondents, now applies for an expedited hearing of the appeal. Now produced and shown to me marked 'ALM -6' is a copy of a letter from the respondents' solicitors, Arnold Bloch Leibler, dated 9 April 2003 in which they confirm their consent to this application.
8. Now produced and shown to me marked 'ALM -7' is a copy of the transcript of the hearing before Justice Warren on 20 February 2003, when she granted the extension of time for the filing of any notice of appeal. Mr Leon Zwier, of Arnold Bloch Leibler who appeared for the Administrators, stated (refer to pages 2 and 3 of the transcript):

'Your Honour is correct in observing that this matter is in the public interest and there is a great deal of public attention focused on it. ...

... The administrators presently are of the view that a short extension of time may enable the parties to reach that settlement. If they are unable to do so, Your Honour, then obviously it may require one or more of the parties to proceed with an appeal and all the parties would thereafter, and perhaps I'm overstating it, seek expedition, and would not want this short adjournment to be seen as suggesting that there is no urgency, Your Honour.'

9. The Plan has approximately 9,000 members who are waiting for their benefits to be paid by the Trustee. The Trustee is unable to pay their benefits in full unless it is successful


MIEL4_651479_1 (W977)



in this appeal (and in the related proceeding in the Federal Court). The amount claimed by the Trustee from the Administrators is in excess of \$100m. The Trustee is concerned that considerable time has already passed and that the final asset position of the Plan is still as yet not known. All members are adversely affected by further delays, particularly perhaps those who are at or close to normal retirement age. A successful outcome for the Trustee in this appeal is expected to lead to further delays as the Trustee has issued a proceeding in the Federal Court (V3107 of 2002) where it seeks to be established as a priority creditor under the Ansett DOCA ('DOCA Proceeding'). If the Trustee is successful in the Court of Appeal then (subject to any further appeal) it expects to have to prosecute its proceeding in the Federal Court. Interlocutory orders were made by Justice Goldberg in the Federal Court on 9 April 2003, one result of which should be to reduce the likely delays in the Federal Court. Now produced and shown to me and marked 'ALM-8' is a copy of the orders of Justice Goldberg of 9 April 2003. The Trustee is concerned to request that there be an expedited hearing of this appeal in order to reduce the delays involved so far as is convenient to this Honourable Court.

10. The DOCA Proceeding was commenced by the Trustee in June 2002. In general terms, the Ansett DOCA removes any status as a priority creditor that the Trustee may have in relation to the debt owed by Ansett to the Plan to make up the shortfall to fund the retrenchment benefits to which Plan members are entitled. In the DOCA Proceeding, in essence, the Trustee seeks amendment or termination of the DOCA on the basis that the provisions that seek to remove its status as a priority creditor are unjust, oppressive, unfairly prejudicial to or unfairly discriminatory against the Plan. Now produced and shown to me marked 'ALM-9' is a copy of the transcript of the hearing on 9 April 2003 in the DOCA Proceeding before Justice Goldberg. Mr Simon Whelan QC, who appeared for the Administrators, referred to the affidavit sworn by Damien Pound, an accountant working for the Administrators, who informed the Federal Court that until the determination of this appeal and the DOCA Proceeding the Administrators are unable to pay any further redundancy entitlements to former Ansett group employees, as the payments of those entitlements may be affected by the outcome of the litigation (page 10 of the transcript).

