

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 a Deed of Company
Arrangement) & **ORS** (ACN 004 209 410)

Respondents

AND BETWEEN:

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

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) & **ORS**

Cross Respondents

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 23 April 2003

Filed on behalf of the Respondents and Cross Appellants

Prepared by:

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This is the exhibit marked "CLF-6" now produced and shown to Carmel Lyndsay Flynn at the time of swearing her affidavit on 23 April 2003.

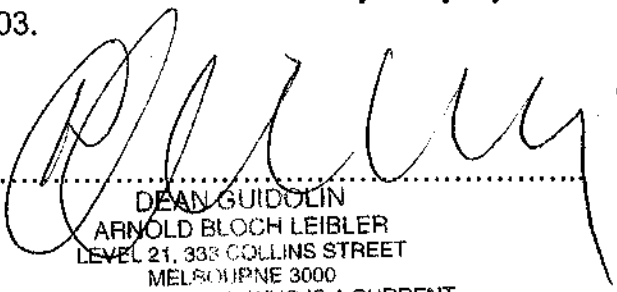

.....
DEAN GUIDOLIN
ARNOLD BLOCH LEIBLER
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A NATURAL PERSON WHO IS A CURRENT
PRACTITIONER WITHIN THE MEANING OF
THE LEGAL PRACTICE ACT 1986.

Exhibit "CLF-6"

**Copy of the Respondents outline of facts
and contentions dated 7 April 2003**

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN REGISTRY

V3107 of 2003²

BETWEEN:

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

and

Applicant

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

and

First Respondent

MARK FRANCIS XAVIER MENTHA and MARK ANTHONY KORDA
(As Deed Administrators of Ansett Australia Limited) (Subject to Deed of Company
Arrangement)

Second and Third Respondents

**RESPONDENTS' OUTLINE OF CONTENTIONS OF
FACT AND LAW**

1. These contentions are made in respect of the respondents' motion for orders that paragraphs 1, 2, 3, 4, 7 and 8 of the application be set down for trial and fixed for hearing.
2. The respondents rely upon the affidavit of Mark Anthony Korda sworn 31 March 2003 ("the Korda affidavit") and a further affidavit of Mr Korda yet to be sworn.
3. In summary, the respondents contend that the trustee's application to vary or terminate Ansett's Deed of Company Arrangement, other than insofar as it relies upon non-disclosure, should be heard as soon as possible.

Background

4. By application dated 19 June 2002 ("the application"), the applicant seeks orders, in paragraphs 2, 3, 4, 7 and 8, *inter alia*, that the Deed of Company

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Arrangement made on 2 May 2002 between Ansett Australia Limited (Subject to Deed of Company Arrangement) ("Ansett"), each acknowledging Ansett Group Company and the second and third respondents, in their capacity as voluntary administrators and deed administrators of Ansett ("the DOCA") be amended or alternatively terminated pursuant to ss. 447A(1) and/or 445D(1) of the *Corporations Act 2001* ("the Act") on the grounds that the provisions of the DOCA which provide for the priority of the "Top Up Retrenchment Benefit Claim" are, or giving effect to those provisions would be, unjust, oppressive, unfairly prejudicial to or unfairly discriminatory against the Ansett Australia Ground Staff Plan ("Ground Staff Plan"). A copy of the DOCA is exhibited as "MAK9" to the Korda affidavit.

5. "Top Up Retrenchment Benefit Claim" is defined in clause 1 of the DOCA to mean:

"the amount of any claim for payment or contribution to a Superannuation Fund in respect of any shortfall in the Superannuation Fund in meeting or paying retrenchment benefits, being a claim of the type raised in Victorian Supreme Court proceeding no. 2115/01 ... as so determined in that proceeding (if any)."
6. Pursuant to clause 18.2.5 of the DOCA, the Top Up Retrenchment Claim is accorded priority equal to that of an unsecured creditor. [See also clauses 1.1 "Priority Creditors", "Priority Creditor Amounts", 1.4.2, 3.8, 16, 18.2.4.3 and 18.3.]
7. The application to vary or terminate the DOCA is, pursuant to paragraphs 4 and 8 of the application, conditional upon the outcome of Supreme Court of Victoria proceeding no. 2115 of 2001 ("the Supreme Court proceeding").
8. The Supreme Court proceeding was brought by the Ground Staff Plan Trustee (the applicant in this proceeding) by way of Originating Motion Between the Parties for relief pursuant to Order 54 of the Supreme Court Rules, that is, for the determination of questions as to the rights or interests of persons claiming to be entitled under a trust. The defendants to that proceeding were the respondents to this proceeding and representatives of these members of the Ground Staff Plan who have been made redundant since 12 September 2001 and those who have not.

9. By the Fourth Amended Originating Motion dated 20 February 2003 ("the Originating Motion"), the plaintiffs sought answers and declarations in relation to 14 questions. The questions essentially related to three issues which were as follows:

1. Are all or any of the members of the Ground Staff Plan who have been made redundant by the administrators of Ansett since 12 September 2001 entitled to Retrenchment benefits under Rule 1.13 of the First Schedule to the Ground Staff Plans Trust Deed dated 17 August 1999 made between Ansett and the Ground Staff Plan Trustee?¹
2. Is Ansett obliged to make further contributions, and if so what further contributions, to the Ground Staff Plan to fund any shortfall in the Plan to pay the Retrenchment benefits to the members so entitled.
3. Is the obligation to make further contribution to fund the Retrenchment benefits, if any:
 - (a) an expense within the meaning of s. 556(1)(a) of the *Corporations Act 2001* (Act)?
 - (b) a debt within the meaning of s. 556(1)(c) of the Act?
 - (c) an expense within the meaning of s. 556(1)(dd) of the Act?
 - (d) a superannuation contribution within the meaning of s. 556(1)(e) of the Act?

The history of the superannuation proceeding is set out in paragraphs 49-60 of the Korda affidavit. The issue of priority of the Top Up Retrenchment Benefit

¹ The first issue initially came before this Court in proceeding V3075 of 2001. In that proceeding, the respondents to this proceeding by agreement with the applicant in this proceeding, sought *inter alia*:

"Directions pursuant to s. 447D of the *Corporations Act* and a declaration pursuant to s. 21 of the *Federal Court Act* as to whether the recent termination of the employment of employees is a 'Retrenchment' for the purposes of the respective trust deeds of the Ansett Staff Superannuation Plans."

Claim under the DOCA was not, by agreement between the parties, before the Court in the Supreme Court proceeding.

10. By orders dated 7 February 2003 ("the orders"), Justice Warren answered the questions in the Originating Motion, *inter alia*, as follows:
 - (a) all members of the Ground Staff Plan who have been made redundant by the administrators of Ansett since 12 September 2001 are entitled to Retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed;
 - (b) Ansett 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");
 - (c) the further contributions required for Membership Group 3 under FSC5 do not have priority under ss. 556(1)(a), (c), (dd) and (e) of the *Corporations Act*. The further contributions required for Membership Group 1 under FSC5 are expenses within the meaning of s. 556(1)(a).
11. The reference to a funding and solvency certificate in the orders is a reference to a certificate issued by the actuary of a superannuation plan pursuant to Division 9.3 of the *Superannuation Industry (Supervision) Regulations 1994*. 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 with an effective date of 24 April 2002. FSC5 is exhibited as "PEC3" to the affidavit of Peter Edmund Cash sworn 19 June 2002 ("the Cash affidavit"). The reference to Membership Group 3 is a reference to the group members identified as such in Appendix B to FSC5.
12. By Notice of Appeal dated 24 March 2003, the Ground Staff Plan Trustee has appealed against the orders of Justice Warren as to the priority of the further contributions (the answers to the question in paragraphs 14(a), (c) and (d) of the Originating Motion) in so far as those orders refer to the further contributions required for Membership Group 3 under FSC5. The Notice of Appeal is exhibit "MAK13" to the Korda affidavit. The respondents to the appeal are the respondents to this proceeding.

13. Ansett and the administrators (the respondents to this proceeding) have cross appealed against the orders of Justice Warren made in relation to issue 2 set out in paragraph 10(b) above (the answer to question 12(a) of the Originating Motion). Ansett and the administrators intend to file a Notice of Contention in relation to the priority issue.
14. The cross-respondent to the cross-appeal is the Ground Staff Plan Trustee. The Notice of Cross-Appeal will be exhibited to the further affidavit of Mr Korda.

The Federal Court Application should be heard as soon as possible

15. The respondents submit that the relevant parts of the application should be set down for trial and fixed for hearing, despite the pending appeal and cross-appeal in the Supreme Court proceeding, for the following reasons:

15.1 The DOCA is determinative of priority

- 15.1.1 The determination of the question of priority in the Supreme Court proceeding is premised on the assumption that Ansett is in liquidation. Ansett is not in liquidation, it is under the DOCA pursuant to Pt. 5.3A of the Act. The DOCA has made provision for the priority of the Top Up Retrenchment Benefit Claim. Priority ought to be determined under Part 5.3A.

15.2 Ansett's creditors voted overwhelmingly for the DOCA

- 15.2.1 The DOCA was voted for by a very substantial majority of Ansett creditors² and, unless amended or terminated by this Court in this proceeding, its provisions determine the priority of the Top Up Retrenchment Benefit Claim.

15.3 Analysis of the financial consequences of priority (and costs of the dispute to date) fortify a resolution by reference to Part 5.3A and the creditor's vote

- 15.3.1 Analysis in detail of the consequences of priority has now been possible. Without in any way depreciating the individual amounts involved, once the

² The poll results appraising the proposed DOCA for Ansett are exhibited as "MAK8" to the Korda affidavit. Ansett's creditors voted in favour by majorities of 91.64% in value and 97.18% in number.

Commonwealth is taken into account (as the Administrators believe must be done), the net effects are much less than were foreshadowed, and there are valid grounds for concern as to whether the costs incurred in the dispute are warranted. All of this fortifies the case for an early resolution under Part 5.3A rather than through further litigation premised upon a hypothetical winding up.

15.4 Eventually the Federal Court will have to determine this application in any event

15.4.1 The issue of priority under s. 556(1) of the Act was agitated by the Trustee in the Supreme Court proceeding, with the support of the respondents to this proceeding, because it was linked to the other issues before the Supreme Court for determination and was potentially relevant to this application. It is potentially relevant to this proceeding because the question of priority under s. 556(1) of the Act is relevant to, but it is submitted not determinative of, the question whether the provisions of the DOCA are unjust, oppressive, unfairly prejudicial to or unfairly discriminatory against the Ground Staff Plan. However, any determination on the priority question by the Court of Appeal will not resolve the issue. This application will need to be heard in any event.

15.5 It is not certain that the Court of Appeal will entertain the priority dispute

15.5.1 The Supreme Court proceeding insofar as it concerns priority is premised on a hypothetical winding up. It is not certain that the Court of Appeal will deal with the issue on that basis. They may say that the matter ought to be determined in this application.

15.6 Two hearings are possible whichever course is chosen, but a Federal Court decision is more likely to resolve the matter

15.6.1 The Federal Court application is more likely to resolve the matter because it addresses the true legal basis for the determination of priority, being the validity of the terms of the DOCA.

15.7 A final determination of priority under s. 556(1) of the Act is not a prerequisite to the attack on the DOCA

15.7.1 Justice Warren has made a declaration as to the priority of the Trustee's claim as if Ansett was in liquidation. It is submitted that a further determination by the Court of Appeal on the question of priority under s. 556(1) is not necessary before the Court can determine this application. The Administrators will not contend that the priority issue has already been determined.

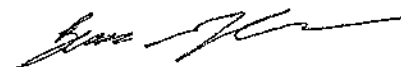
15.8 Ambit of this application is comparatively narrow

15.8.1 The questions which the respondents seek to have set down for hearing on this application, are of comparatively narrow ambit, namely whether the provisions of the DOCA as to the priority of the Top Up Retrenchment Benefit Claim should be amended or alternatively whether the DOCA should be terminated, on the basis that the provisions are, *inter alia*, unfairly prejudicial. It is submitted that it is not necessary for questions 5, 6 and 9 to be set down as they are factually complex and can be dealt with subsequently, if necessary, by a further meeting.

15.8.2 The ambit of the appeal and the cross-appeal are potentially wider than may appear to be the case. The priority issue is a difficult legal issue, but it also requires a detailed investigation of the nature of the obligation. The issues raised by the cross-appeal are also potentially complex. In addition, there remain unresolved issues in the Supreme Court (eg., "mutual benefit" in respect of the priority issue) which may mean the matter will have to be remitted to Justice Warren if either the appeal or the cross-appeal succeed.



S P WHELAN



B M McMAHON

7 April 2003